COPY

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Plaintiff

ENDORSED
FILED
ALAMEDA COUNTY
JUL 13 2005
CLERK OF THE SUPERIOR COURT
By _____ Deputy

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

ABDUL-JALIL al-HAKIM,

Plaintiff,

V.

CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU, KENNETH C. GEORGE, RONALD J. COOK, WILLOUGHBY, STUART & BENING, AND DOES 1 THROUGH 100 , inclusively,

Defendants,

/

Case No. 811337-3

NOTICE OF MOTION AND MOTION TO DISQUALIFY JUDGES. C.C.P. §170.1, §170.1(a)(6)

Date: August 15, 2005
Time: 9:00 A.M.
Location: Department 31
Trial Date: NONE

TO DEFENDANTS CSAA, THEIR ATTORNEY'S OF RECORD AND ALL RELATED PARTIES:

NOTICE IS HEREBY GIVEN that on August 15, 2005 at 9:00 a.m. or as soon thereafter as the matter may be heard, in Department 31 of this court, located at 201- 13th Street, Oakland, California, 94612, plaintiff Abdul-Jalil al-Hakim will and hereby, move for an order TO DISQUALIFY JUDGES JAMES A. RICHMAN AND STEPHAN A. BRICK.

This motion will be based on this Notice of Motion, the Declaration and Statement of Disqualification of Abdul-Jalil al-Hakim, the Memorandum of Points and Authorities served and filed herewith, and the papers and records on file herein, and on such oral and documentary evidence as my be presented at the hearing on the motion.

Respectfully submitted this 12th day of July, 2005.

ABDUL-JALIL al-HAKIM
Plaintiff in Pro Per

ABDUL-JALIL AL-HAKIM
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Plaintiff

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

ABDUL-JALIL al-HAKIM, Plaintiff, V. CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU, KENNETH C. GEORGE, RONALD J. COOK, WILLOUGHBY, STUART & BENING, AND DOES 1 THROUGH 100 , inclusively, Defendants, _____/	Case No. 811337-3 **PLAINTIFF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISQUALIFY JUDGES. C.C.P. §170.1, §170.1(a)(6)** **Date: August 15, 2005** **Time: 9:00 A.M.** **Location: Department 31** **Trial Date: NONE**

INTRODUCTION & STATEMENT OF FACTS

Plaintiff ABDUL-JALIL al-HAKIM ["Plaintiff"] filed his initial complaint for,inter alia, breach of contract and insurance bad faith on April 19, 1999. Defendants CALIFORNIA STATE AUTOMOBILE ASSOCIATION, et al., ["Defendants"] successfully moved the court for an order compelling Plaintiff to submit to contractual appraisal-equivalent in effect to contractual arbitration-and tolling the running of the five-year statute under C.C.P. §583.310 pending completion of that appraisal. See: **Exhibit "A"**. This motion was heard and granted on September 2, 1999, although the formal order memorializing the court's ruling was not signed until October 7, 1999.

The appraisal award was not issued until May 2, 2000, a revised appraisal award issuing on June 29, 2000. Both were fatally flawed by the appraisers' fundamental misunderstanding of the appropriate property valuation measures, as well as by Defendants' improperly injecting fraud and coverage issues into the appraisers' consideration, tainting the appraisers' ability to render an impartial, accurate appraisal of Plaintiff s loss.

On August 8, 2000, plaintiff promptly moved to vacate the appraisal awards. However, on September 5, 2000, defendants obtained an *ex parte* continuance of plaintiffs motion to vacate the appraisal awards and then, for the next two years during a protracted discovery dispute, defendants persuaded the court not to hear plaintiffs motion to vacate until plaintiff proved his compliance with the court's discovery orders, including with regard to discovery *unrelated* to the issue of appraisal

and valuation. Plaintiff tried again and again to satisfy the court in this regard and plaintiff's Motion to Confirm Compliance was finally granted on November 2, 2002.

The court then allowed plaintiff to reset his motion to vacate the appraisal awards which was heard on January 2, 2003, taken under submission, and ultimately granted on or about February 27, 2003. The order by Judge Richman returns the parties back to the appraisal process under the terms and conditions of the previous order for appraisal and stay of action.

Subsequently, on August 28, 2003, plaintiff obtained leave to file a supplemental and first amended complaint,. Among other things, plaintiffs Supplemental and First Amended Complaint included additional claims arising out of defendants' conduct which occurred after the filing of the original complaint, including, but not limited to, the conduct of defendants and their agents during the April 2000 appraisal process, described by The Hon. James A. Richman as having been tainted by Defendants' "corruption, fraud, [and/or] other undue means".

This case was set for trial March 11, 2005. Most recently, on March 8, 2005, plaintiff successfully moved the court to continue the trial until the completion of the appraisal, wherein the court reopened discovery and set this matter for trial setting conference on July 14, 2005. This ruling is what has brought on the controversy submitted herein.

Plaintiff informed the court at that time that there was an outstanding order for the completion of the appraisal that was under a stay that applied to the current proceedings and that plaintiff was awaiting the full written disclosure of the defendants appraiser relative to his review of the transcripts and documents from the plaintiff's EUO and vacated Appraisal hearing to determine if in fact he was tainted and therefore biased and unfit to serve on the panel. Said proposed appraiser has failed and refused to provide this information to Plaintiff and his counsels, who have been trying to secure this disclosure since July 2004 without success, thus needlessly delaying the appraisal process.

Plaintiff is current serving in Pro Per. Upon reviewing the file, plaintiff became aware of serious issues requiring the immediate attention of this court, to wit: the fast-approaching five year statute, and the upcoming July 14, 2005 Trial Setting Conference, all complicated by the lack of certainty as to the appropriate amount of tolling applicable thereto and exacerbated by the same lack of certainty regarding the current stay in place while the matter must undergo a second reappraisal hearing process, and he thus promptly prepared the appropriate motions pursuant to C.C.P. §583.310 to determine if the order by Judge Richman returns the parties back to the appraisal process under the terms and conditions of the last order for appraisal and stay of action, and to determine the length of the stay that was imposed until the completion of the appraisal process as ordered in January 2000 which ran until March 17, 2000 or until the completion of the appraisal.

The Gravamen of The Controversy

Plaintiff is aware, feels, believes and thereon allege that Judges Richman and Brick have been guilty of misconduct and shown disdain, malice, bias and/or prejudice towards plaintiff in the past, so for the purposes in this and future proceeding,, that is grounds for disqualification and are disqualified from hearing the above entitled matter under Code Civ. Proc. § 170.l(a)(6). Plaintiff is convinced that a fair and impartial trial hasbeen denied in the past and could not be had before these judges now or in the future.

As clearly demonstrated in the declaration, plaintiff is certain that in the past they both have exhibited this misconduct, disdain, malice, bias and/or prejudice; has stated a belief that prohibits the right to the presumption of innocence until proven guilty on behalf of plaintiff; has stated a belief that plaintiff has committed perjury; has shown a fixed opinion of plaintiff, the matter before the court and law; has exhibited and expressed remorse and regret for rulings that were made in plaintiff's favor and subsequently engaged in rulings to destroy them afterwards; has exhibited bias and preference for the defense counsels, defendants that were attorneys, and certain of plaintiff's former attorney's, appraisers, and potential umpires as **friends** that have negatively impacted decisions made by them against plaintiff; and have consistently displayed disdain, malice and a mental attitude or disposition toward plaintiff that is so drastic and serious so as to impair these judge's impartiality beyond recovery, that it is not possible that a fair trial can be held before them, and they must be disqualified.

II.
STATEMENT OF LAW AND ARGUMENT

The standards of conduct to which judges are held are reflected in part in the canons of the Code of Judicial Conduct. Although these canons do not have the force of law or regulation, "they reflect a judicial consensus regarding appropriate behavior" for California judges. (*Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal. 3d 826, 838, fn. 6 [264 Cal. Rptr. 100, 782 P.2d 239, 89 A.L.R.4th 235]; see *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal. 3d 678, 707, fn. 22 [122 Cal. Rptr. 778, 537 P.2d 898].) The failure of a judge to comply with the canons "suggests performance below the minimum level necessary to maintain public confidence in the administration of justice." (*Kloepfer v. Commission on Judicial Performance*, supra, 49 Cal. 3d at p. 838, fn. 6.)

An impartial and independent judiciary is indispensable to our legal system. Of equal importance is public confidence in the independence and integrity of the judiciary, because the effective functioning of our legal system is dependent upon the public's willingness to accept the judgments and rulings of the courts. (Cal. Code Jud. Conduct, com. to canon 1.) Plaintiff argues that the court can not allow this type of willful misconduct in office and conduct prejudicial to the administration of justice (moral turpitude, corruption, and dishonesty) that brings the judicial office into disrepute. (Art. VI, § 18, subd. (c).)

By their actions, Judges Richman and Brick has violated the Canons of the Code of Judicial Conduct, which requires that judges conduct themselves "at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." The judge's actions, brash comments and statements were manifested in bad faith while they was acting in their judicial capacity. (Spruance, supra, 13 Cal. 3d at p. 796.) Their actions therefore constitute willful misconduct.

1. JUDGES RICHMAN AND BRICK HAVE COMMITTED MISCONDUCT

The charge of willful misconduct connotes "unjudicial conduct which a judge acting in his judicial

capacity commits in bad faith, . . ." (Id. at p. 284.) "Bad faith" is equivalent to actual malice and encompasses the intentional commission of acts which the judge knew or reasonably should have known were beyond his lawful power, as well as acts which though within the ambit of lawful judicial authority are committed for purposes other than the faithful discharge of judicial duties. Judge Richman stated that "I (Richman) gave you(plaintiff) the best decision(motion to vacate the appraisal awards) that I have written" in my years on the bench and immediately you dropped your attorney" expressed extreme regret for having made that decision and when confronted with the likelihood of another motion to vacate due to the continued violations of the defense, he stated that " I don't know if I would make that same decision again". Clearly the defendants interjecting into this appraisal of the very the same issues that Judge Richman found objectionable in the first appraisal is grounds for and assures another verdict of fraud against the defendants and would vacate any award rendered by that panel and his suggestion to the contrary is indicative of his bad faith and misconduct according to *Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal. 3d 778, 796 [119 Cal. Rptr. 841, 523 P.2d 1209].)

This bad faith is expressed even more candidly when again he requests to dismiss the attorney's, more of his friends, from the summary judgment because "they are lawyer's, just like you(plaintiff's counsel Mr. Hubbard) and Mr. Barber are lawyers". He makes this statement despite the fact that in January 2003 he ruled that these same individuals had committed tortuous acts against plaintiff in denying their motion for summary judgment, and in an emotional lapse, says "he is troubled by the case, that he opened up the appraisal and made the order for plaintiff". He then grants the motion for summary judgment for the defendant attorneys in full violation of *Spruance, supra*, 13 Cal. 3d.

As a matter of law Judge Richman has also violated canon 2B of the Code of Judicial Conduct, which provides that "A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him . . . ." Judge Richman has repeatedly mentioned that he was **friends** with Dave Rudy- the plaintiffs former appraiser, Ralph Lombardi- the proposed umpire, members of the defense firm of Ropers Majeski, and partners of Burnham Brown, the defendant attorney's that he granted the summary judgment for, that he knows plaintiff's attorney Charles Bonner and was impressed with attorney McKeown, Judge Richman tells the defense counsel to "take him(plaintiff) to trial and put before the jury that he spent 19 months futzing around firing Rudy and disagreeing with Lombardi(**his well noted friends**) and giving outrageous requests for disclosure", where this favoritism and partiality existed in Spruance the court held a similar violation of canon 2B to constitute willful misconduct. (*Spruance, supra*, 13 Cal. 3d at p. 798.) It was out of this fierce allegiance to his friends that Judge Richman stated that he believed that " the inference is that you(plaintiff) committed fraud or inadvertent fraud"; "his damages is increasing because he is out of the home" further suggesting that "plaintiff has motives not to complete the appraisal" accusing plaintiff of criminal wrongdoing; that the plaintiff was "a liar"; and in defense of his friends, "if there is a problem then it must be you!!!(plaintiff)". He had to know there was something judicially improper about his conduct that could not preclude a charge of willful misconduct, for that term embraces intentional conduct that a

judge should have known was beyond his judicial authority as found in *Geiler*, supra, 10 Cal. 3d at p. 286.

2. JUDGES RICHMAN AND BRICK HAVE COMMITTED CONDUCT PREJUDICIAL

The lesser included charge of conduct prejudicial connotes "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office," as well as willful misconduct out of office, "i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity." (*Geiler*, supra, 10 Cal. 3d at p. 284 & fn. 11.) (6) A judge may be censured or removed from the bench only for willful misconduct or conduct prejudicial.

These comments by judge Richman convicting plaintiff of fraud; criminal activity by having a financial motive not to complete the appraisal; being a "liar" and "the problem", also pose a serious threat to public esteem for the integrity of the judiciary, as held in *re Stevens* (1982) 31 Cal. 3d 403 [183 Cal. Rptr. 48, 645 P.2d 99], inappropriate comments uttered in chambers do constitute the lesser offense of conduct prejudicial. (Id. at p. 404.) Derogatory remarks, although made in chambers or at a staff gathering, may become public knowledge and thereby diminish the hearer's esteem for the judiciary -- again regardless of the speaker's subjective intent or motivation. The reputation in the community of an individual judge necessarily reflects on that community's regard for the judicial system. You must hold that Judge Richman's remarks constitute conduct prejudicial at a bare minimum.

Judge Richman was intemperate and stepped outside the boundaries of what could be characterized as proper. A plain reading of the declaration and the transcripts attached hereto, clearly reflects that the judge's intent was to intimidate, infer, convict and establish plaintiff as a liar, the problem, committed fraud, and as such, impress on those in attendance a judicial imprimatur of the defense's position. (*See People v. Brock* (1967) 66 Cal.2d 645, 649, 654-655 [58 Cal. Rptr. 321, 426 P.2d 889]; *People v. Flores*, supra, 17 Cal. App. 3d at p. 587 ["When the trial judge's remarks transgress the bounds of critical comment and assume the complexion of partisan advocacy and conclude with an expression of a defendant's guilt such comment is prejudicial as a matter of law"].)

3. EX PARTE COMMUNICATIONS

One need only look at the the signed orders dated June 22 and 24, 2005, and both orders dated July 6, 2005, striking the challenge of Judges James A. Richman and Stephan A. Brick for cause, to see that they are identical, though signed individually by the respective judges on different days, to be convinced that there was obvious collusion and inappropriate ex parte communication between the judges, even if through a third party. One can view the same in the case of *Fremont Indemnity Co. v. Workers' Comp. Appeals Bd.*, 153 Cal. App. 3d 965 to find the inappropriate context of both Judge's actions. Consider that " The Initiation and Consideration by a Judge of Ex Parte Communications

Concerning a Proceeding Pending Before That Judge Violates the Requirements of a Fair Trial and Due Process of Law".

Here you have a virtually impossible chance that two competent, qualified, well versed judges could write separate orders on four occasions that result in identical orders without any consort. This misconduct on behalf of the judges legally or practically prevents any party from having a fair trial, wherein the findings and award resulting from such misconduct must be annulled, and the matter remanded for further proceedings as in the event of a mistrial in municipal and superior courts. (*Reimer v. Firpo* (1949) 94 Cal.App.2d 798, 801 [212 P.2d 23]. *See Fidelity & Cas. Co. of New York v. Workers' Comp. Appeals Bd.* (1980) 103 Cal.App.3d 1001, 1015-1016 [163 Cal. Rptr. 339]; *Hartford Accident & Indemnity Co. v. Workers' Comp. Appeals Bd.* (1982) 132 Cal.App.3d 796, 806-807 [183 Cal. Rptr. 440].)

4. Disqualification

California has adopted a detailed statutory framework to govern the disqualification of judges. Specifically, Code of Civil Procedure section 170 provides in pertinent part: "(a) No justice or judge shall sit or act as such in any action or proceeding: [para.] . . . [para.] (5) When it is made to appear probable that, by reason of bias or prejudice of such justice or judge a fair and impartial trial cannot be had before that justice or judge." Subdivision (b) of section 170 provides that a justice or judge, having knowledge of facts which bring him or her within the categories of disqualification enumerated in subdivision (a), shall disclose the facts in open court and cause such facts to be made a part of the record. Subdivision (c) provides a mechanism by which any party to the litigation can raise such facts should the judge fail to do so. Subdivision (d) provides that a trial judge may, after a statement of disqualification is filed pursuant to subdivision (c), either file with the clerk a consent that the matter be tried before another judge or file a verified answer within 10 days admitting or denying any or all of the allegations in the statement of disqualification and setting forth any additional information relevant to the question of disqualification. Subdivision (e) outlines the procedure to be followed in the event a judge files an answer to a statement of disqualification denying the allegations: "(e) No judge against whom a statement of objection or disqualification has been filed pursuant to this section, shall hear or pass upon any question of fact or law concerning his or her disqualification or the statement of objection or disqualification filed against the judge, but in every such case, all the questions concerning the judge's disqualification shall be heard and determined by some other judge agreed upon by the parties who shall have appeared in the action or proceeding, or, in the event of their failing to agree, by a judge assigned to act by the Chairman of the Judicial Council, and, if the parties fail to agree upon a judge to determine the questions of fact and law pertaining to the disqualification, within five days after the expiration of the time allowed herein for the judge to answer, it shall be the duty of the clerk then to notify the Chairman of the Judicial Council of that fact, and it shall be the duty of the Chairman of the Judicial Council forthwith, upon receipt of notice from the clerk, to assign some other judge, not disqualified, to hear and determine these questions and each of them."

Plaintiff has filed now a third motion including statements of disqualification to disqualify judges Richman and Brick as well as a complaint with the State of California Judicial Council against them, in an effort to attain a fair hearing in his matter before the court. The judges categorical denial of the motions never addresses the issues that caused plaintiff to file the motion, that is his certainty that the judges can not be fair and impartial. One referenced order states that the judges used an "abundance of caution" in interpreting the challenge. If that is so then they would have recused themselves to remove any possible doubt about their impartiality even if it is only in the mind of the plaintiff. For that is where the test of the law remains and plaintiff will not waive this conflict. If the judges are to err, than it should be on the side of caution with their recusal, and not their insistence on forcing their presence where it has and will cause further conflict and result in further appeal. That it is this very same bias, prejudice, malicious attitude, disposition and defiance in the respective judges' conduct which has occurred in the past that plaintiff is illustrating, that he fears, is apparent to all by their insistence on not recusing themselves and he is filing this complaint about. Plaintiff has never been afforded the opportunity for a fair hearing on this matter and it is with the principles of due process in mind, plaintiffs' contention that, in failing to afford a full evidentiary hearing on the motion to disqualify Judges Richman and Brick, his constitutional rights are impinged by their obstruction of justice. The purpose of section 170 is to insure that a party is given a fair and impartial trial as sought by plaintiff. (*People ex rel. Air Resources Bd. v. Superior Court* (1981) 125 Cal.App.3d 10, 17 [177 Cal.Rptr. 816].)

a. Code Civ. Proc. § 170. 1 (a)(6) provides that:

A judge shall be disqualified in any proceeding when for any reason [Code Civ. Proc. § 170. 1 (a)(6)]:
(1) The judge believes his or her recusal would further the interests of justice,
(2) The judge believes there is a substantial doubt as to his or her capacity to be impartial, or
(3) A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.

California, like the federal courts have recognized that misconduct, bias or prejudice on the part of a judge such as that committed here by judges Richman and Brick, may deprive an accused of due process by depriving him of the right to a fair and impartial trial. (*See, e.g., United States v. Navarro-Flores* (9th Cir. 1980) 628 F.2d 1178, 1182; *Corbett v. Bordenkircher* (6th Cir. 1980) 615 F.2d 722, 723.)

In consideration of the gravity of the charges leveled here against the judges of misconduct, conduct prejudicial, negligence, bias, prejudice, bad faith, inappropriate ex parte communications, denial of due process, obstruction of justice, the friendship and favoritism displayed towards certain parties, the accusations made by the judges of plaintiff's criminal conduct without any evidence, the disdain,

and malice exhibited toward plaintiff by said judges, and considering specifically, Code of Civil Procedure section 170 provides in pertinent part: "(a) No justice or judge shall sit or act as such in any action or proceeding: [para.] . . . [para.] (5) When it is made to appear probable that, by reason of bias or prejudice of such justice or judge a fair and impartial trial cannot be had before that justice or judge." They must recuse.

b. Judges Richman and Bricks Bias or prejudice towards a plaintiff or lawyer in the proceeding may be grounds for disqualification [Code Civ. Proc. § 170.l(a)(6).

Based upon the plaintiff's three motions and sworn belief that he cannot obtain a fair trial before the assigned judges, and assurance of a fair hearing or trial is the basis for any judicial disqualification, the judges must recuse. Although the affidavit required by section 170.6 may be based upon the belief of the party or of the attorney that the judge is prejudiced against him, the statute mandates that the affidavit also attest that, as a result of such prejudice, the party or the attorney believes he" . . . cannot have a fair and impartial trial or hearing before such judge . . . ." (Code Civ. Proc., § 170.6, subd. (2).) Nothing could be more apparent than what plaintiff has presented here to demonstrate his belief that the judges must recuse.

c. Under Code Civ. Proc. § 170.1(a)(6)(C), a court need not determine whether there is actual bias to order disqualification of Judges Richman and Brick.

The objective test is whether a reasonable member of the public at large, aware of all the facts that plaintiff has brought before the court in the three motions to disqualify, would fairly entertain doubts as to the judge's impartiality (*Briggs v. Superior Court* (2001) 87 Cal. App. 4th 312, 318-319, 104 Cal. Rptr. 2d 445; *Ng v. Superior Court* (1997) 52 Cal. App. 4th 1010, 1024, 61 Cal. Rptr. 2d 49]. Code Civ. Proc. § 170. 1 (a) (6) is broader than the former Code Civ. Proc. § 170(a)(5) which provided for disqualification when it appeared probable that, by reason of bias or prejudice on the part of the judge, a fair and impartial trial could not be had before that judge *[see Ensher, Alexander & Barsoom v. Ensher* (1964) 225 Cal. App. 2d 318,322-323, 37 Cal. Rptr. 327].

In the instant case, we have a plaintiff who has had many instances of what clearly qualifies as disdain, malice, extreme bias and prejudice and willful misconduct toward plaintiff, and favoritism for the defendants and attorneys on behalf of both Judges Richman and Brick such that there is no doubt that he could never receive a fair and impartial trial based on the facts and merits of this case. All of the instances referenced below apply to every category of offenses under Code Civ. Proc. § 170.1(a)(6). *See Briggs, Ng, and Ensher* above).

Plaintiff offers that Judge Richman has mentioned numerous times that he is **friends** with Dave Rudy- the plaintiffs former appraiser, Ralph Lombardi- the proposed umpire, members of the defense firm of Ropers Majeski, and partners of Burnham Brown, Eric Haas, and Charles Bonner- plaintiff's former counsels. The judge's intent to intimidate, infer, convict and establish plaintiff as a liar, the

problem, committed fraud, while the judges themselves are guilty of misconduct, conduct prejudicial, negligence, bias, prejudice, bad faith, inappropriate ex parte communications, denial of due process, denied plaintiff the presumption of innocence, obstruction of justice, the friendship and favoritism displayed towards certain parties, the accusations made by the judges of plaintiff's criminal conduct without any evidence, the retaliation, disdain, and malice exhibited toward plaintiff by said judges and as such, impress on those a judicial imprimatur of the defense's position, seems to have let the passion of their convictions interfere with their duty to be scrupulously fair and to not invade the province of the jury as the exclusive trier of fact. (*People v. Cook*, supra, 33 Cal.3d at p. 408; *People v. Friend*, supra, 50 Cal.2d at pp. 577-578.) Trial judges should heed Isabella's admonition in Shakespeare's Measure for Measure, act II, scene 2, when she declares: **"O it is excellent to have a giant's strength; but it is tyrannous to use it like a giant."**

In a prior matter, Judge Brick has ordered that defendant attorneys to be allowed the benefit of being dismissed from the action when they had failed to timely serve and file any response to a motion despite having the motion in it's hands for over a month before the court date, and further allowed them to deduct attorneys fees and costs from money that they had fraudulently obtained from Defendant Raju, yet he dismissed an action for same against plaintiff when he could not timely serve defendant because of a computer failure in the clerk's office and denied plaintiff the fees and costs that he had ordered and promised for nearly a year. He did this after he had assured plaintiff by order that he would and did in fact grant fees and costs, so upon receiving that assurance from Judge Brick, plaintiff agreed to forego the requested fees and costs as sanctions, only to have him latter decided that he could not find any law to grant attorney's fees. Clearly he can not serve in this matter for anyone would fairly entertain doubts as to the judge's impartiality (*Briggs v. Superior Court* (2001) 87 Cal. App. 4th 312, 318-319, 104 Cal. Rptr. 2d 445; *Ng v. Superior Court* (1997) 52 Cal. App. 4th 1010, 1024, 61 Cal. Rptr. 2d 49].

d. Judges Richman and Brick exhibited Bias and Prejudice which consists of a mental attitude or disposition of a judge toward plaintiff to the litigation.

Bias or prejudice consists of a mental attitude or disposition of a judge toward a party to the litigation [*Ensher, Alexander & Barsoom v. Ensher* (1964) 225 Cal. App. 2d 318, 323, 37 Cal. Rptr. 327] and if it is sufficiently serious to impair a judge's impartiality so that it appears probable that a fair trial cannot be held, a judge will be disqualified *[see Ensher, Alexander & Barsoom v. Ensher* (1964) 225 Cal. App. 2d 318, 322-323, 37 Cal. Rptr. 327].

Judge Richman requested to dismiss the individual attorneys from the summary judgment and laments that "they are lawyer's, just like you(plaintiff's counsel Mr. Hubbard) and Mr. Barber are lawyers". He makes this statement despite the fact that in January 2003 he ruled that these same individuals had committed tortuous acts against plaintiff in denying their motion for summary judgment. Never the less, he repeatedly says he feels bad for the individuals defendants(attorney's) in

this suit, is very emotional while in this obvious state of remorse and regret, he says "something is going on that troubles him". In this noticeable feeling of despair, he again says he is **friends** with and knows plaintiff's former appraiser Rudy, and proposed umpire Lombardi, former counsels Haas and Bonner and he doesn't understand what's going on and repeats it's very troubling, and he doesn't understand it. As is described in *Ensher, Alexander & Barsoom v. Ensher* (1964) 225 Cal. App. 2d 318, 323, 37 Cal. Rptr. 327], Judge Richman's emotional mental state of anxiety, remorse, regret, and despair that troubled him manifested itself in a clear hostile disposition and retaliation against plaintiff when he inexplicably went against all logic, the pleadings, judicial notice, and his own knowledge and granted the summary judgment of the defendant attorneys.

It is made apparent to all that Judge Brick disqualification is required by demonstrating his preference to award attorney's fees and costs to the defendant attorney's who failed to timely file or serve a response and merely appeared at the hearing and complained, and award fees and costs to plaintiffs' prior white attorney, yet when plaintiff appeared with new counsel that was African American, he denied those fees and costs because we were unable to timely file and serve the motion for same that he had previously granted with the attorney because of a problem with the computer in the clerk's office. Judge Brick ordered payment of attorney's fees in the amount of $2,000 and any subsequent amount of fees that would cover all time allocated on this matter until it's conclusion for the fraud and perjury committed by Raju in that matter. This is not only a showing of misconduct, bias and or prejudice, but also racism, a clear determination that by reason thereof, a fair and impartial trial cannot be had [*Briggs v. Superior Court* (1932) 215 Cal. 336, 343, 10 P.2d 1003 (when judge charged that petitioners had misstated truth in their affidavit, it was not probable that he could preside fairly and impartially over a contempt proceeding against them).

e. Further, a judge is disqualified from a case when he or she has stated during the course of a prior trial that he or she believes a party has done one of the following things:

A) Willfully sworn falsely [*Keating v. Superior Court* (1955) 45 Cal. 2d 440, 444, 289 P.2d 209 (judge so stated after conclusion of testimony in fraudulent conversion action); but see *Taliaferro v. Taliaferro* (1962) 203 Cal. App. 2d 642, 647, 21 Cal. Rptr. 864 (judge not disqualified when, in a wholly different prior action, he had "thought of" referring the defendant to the district attorney for perjury but had subsequently apologized to defendant in chambers and had not referred the matter); *McEwen v. Occidental Life Ins. Co.* (1916) 172 Cal. 6, 11, 155 P. 86 (when judge commented that he did not see how jurors could possibly have reached their particular verdict, he was not considered to have charged any party with perjury)],

B) Has willfully misstated the facts [*Evans v. Superior Court* (1930) 107 Cal. App. 372, 382-383, 290 P. 662 (judge likened defendant's conduct to that of a pirate)], or

C) Has knowingly made false statements in an affidavit [*Briggs v. Superior Court* (1932) 215 Cal. 336, 343, 10 P.2d 1103 (constructive contempt action)].

Judge Richman, having already found, convicted and established plaintiff as a liar, the problem, and

committed fraud as in this matter, the court has previously ruled "A trial judge may examine witnesses to elicit or clarify testimony [but he or she] must not become an advocate for either party or under the gui[s]e of examining witnesses[,] comment on the evidence or cast aspersions or ridicule on a witness." (*People v. Rigney* (1961) 55 Cal.2d 236, 241 [10 Cal. Rptr. 625, 359 P.2d 23, 98 A.L.R.2d 186].)

One would have to further conclude the above record reflects that the judge in his conduct and actions of this case and that in several specific instances, the judge prejudicially interfered and conducted himself as though he sided with the defense. See *People v. Perkins*, 109 Cal. App. 4th 1562 109 Cal. App. 4th 1562; 1 Cal. Rptr. 3d 271; 2003 Cal. App. LEXIS 956; 2003 Cal. Daily Op. Service 5738; 2003 Daily Journal DAR 7213.

Further, judge Richman must be disqualified from proceedings to try and decide a case or pass on a motion for new trial because he has stated during the course of this action that in his or her opinion a party has deliberately given false testimony, though the opinion of the judge is not based upon a consideration of the evidence produced *[see Kreling v. Superior Court* (1944) 25 Cal. 2d 305, 312-313, 153 P.2d 734)

In these circumstances, a judge is disqualified even though his or her belief may have been founded on evidence produced during the prior trial *[see Keating v. Superior Court* (1955) 45 Cal. 2d 440, 444, 289 P.2d 209; *Briggs v. Superior Court* (1932) 215 Cal. 336, 343, 10 P.2d 1103] and whether the subsequent trial is to be of the entire case or only a retrial of a single issue [*Keating v. Superior Court* (1955) 45 Cal. 2d 440, 446, 289 P.2d 209 (single issue of damages)].

The rationale behind the rule that a judge is disqualified from the retrial of a cause when he or she has expressed an opinion to the effect that a party has committed perjury in testifying at a former trial is that every litigant has the right to have his or her cause tried by one who has no preconceived opinion against his or her veracity which may preclude a full and fair consideration of the facts and the law involved [*Chastain v. Superior Court* (1936) 14 Cal. App. 2d 97, 103, 57 P. 2d 982].

Here Judge Richman has stated repeatedly that he knew the case very well, that he believed that " the plaintiff committed fraud", was a "liar", was "the problem" and had financial motives not to complete the appraisal suggesting criminal activity, thus again expressing his fixed opinion and establishing his latent bias, prejudice and willful misconduct [*re Kreling v. Superior Court* (1944) 25 Cal. 2d 305, 312-313, 153 P.2d 734, *Keating v. Superior Court* (1955) 45 Cal. 2d 440, 444, 289 P.2d 209; *Briggs v. Superior Court* (1932) 215 Cal. 336, 343, 10 P.2d 1103, *Evans v. Superior Court* (1930) 107 Cal. App. 372, 382-383, 290 P. 662]. There has been no trial of the facts and evidence yet he totally removed any possibility of the presumption of innocence on behalf of the plaintiff from his mind. He has clearly expressed that the plaintiff is "a liar" and has committed perjury as he has maintained his fixed opinion while coercing plaintiff into not rebutting the testimony of Bonner and bringing forth his evidence to support his position.

f. When Judges Have Fixed Opinions as Those Herein, They Must be Disqualified

Judges Richman and Brick have ventured beyond the norm for any judge with their display of misconduct; conduct prejudicial; negligence; bias; prejudice; bad faith; inappropriate ex parte

communications; denial of due process; obstruction of justice; denied plaintiff the presumption of innocence; racism; preference, friendship and favoritism displayed towards certain parties; erroneous decisions; the accusations made by the judges of plaintiff's criminal conduct without any evidence; the retaliation, disdain, and malice exhibited toward plaintiff by said judges and as such; impress on those their fixed opinion and a judicial imprimatur of the defense's position, so malicious that these judges who has a fixed opinion as to some characteristic of a party such that the judge is prevented from deciding the case according to the evidence is disqualified *(see* Adoption of Richardson (1967) 251 Cal. App. 2d 222, 232, 59 Cal. Rptr. 323 (prior to hearing at which deaf-mutes were to seek adoption of child, judge wrote to adoption bureau director and said adoption should be "nipped in the bud"; at hearing, judge indicated that he would not approve an adoption of a normal child by deaf-mutes under any circumstances); *but see Adoption of Schroetter* (1968) 261 Cal. App. 2d 365, 369-370, 67 Cal. Rptr. 819 (judge was not disqualified for having indicated concern over fact that prospective adoptive parent had had psychiatric treatment in past)]. (*See People v. Brock* (1967) 66 Cal.2d 645, 649, 654-655 [58 Cal. Rptr. 321, 426 P.2d 889]; *People v. Flores*, supra, 17 Cal. App. 3d at p. 587 ["When the trial judge's remarks transgress the bounds of critical comment and assume the complexion of partisan advocacy and conclude with an expression of a defendant's guilt such comment is prejudicial as a matter of law"].)

As discussed earlier, these comments, as well as when Judge Richman tells the defense counsel to "take him(plaintiff) to trial and put before the jury that he spent 19 months futzing around firing Rudy and disagreeing with Lombardi(**his well noted friends**) and giving outrageous requests for disclosure", also pose a serious threat to public esteem for the integrity of the judiciary. However, as held in *re Stevens* (1982) 31 Cal. 3d 403 [183 Cal. Rptr. 48, 645 P.2d 99], inappropriate comments uttered in chambers do constitute the lesser offense of conduct prejudicial. (Id. at p. 404.) Derogatory remarks, although made in chambers or at a staff gathering, may become public knowledge and thereby diminish the hearer's esteem for the judiciary -- again regardless of the speaker's subjective intent or motivation. The reputation in the community of an individual judge necessarily reflects on that community's regard for the judicial system.

Judge Bricks open willingness to discriminate against plaintiffs rights versus those of attorneys, and to further discriminate between attorneys based on his preference(race, religion, sex) also clearly demonstrates that he has a fixed opinion and is of a certain mindset that can not be impartial.

In listing the many herein contained transgressions committed by Judge Richman and Judge Brick against plaintiff, the Honorable Judges Richman and Brick are prevented from deciding the case according to the evidence and are unable to conduct a fair, unbiased, impartial or unprejudiced hearing on any of the issues of fact or law which will arise, because there is certainty, not doubt, regarding their capacity to be impartial and that the interest of justice require their recusal. (*See People v. Brock* (1967) 66 Cal.2d 645, 649, 654-655 [58 Cal. Rptr. 321, 426 P.2d 889]; People v. Flores, supra, 17 Cal. App. 3d at p. 587)

As shown in Plaintiff's three Declarations and Statements of Disqualification, in the past they both have exhibited this misconduct, disdain, malice, bias and/or prejudice; has stated a belief that prohibits the right to the presumption of innocence until proven guilty on behalf of plaintiff; has stated

a belief that plaintiff has committed perjury; has shown a fixed opinion of plaintiff, the matter before the court and law; has exhibited and expressed remorse and regret for rulings that were made in plaintiff's favor and subsequently engaged in rulings to destroy them afterwards; has exhibited bias and preference for the defense counsels, defendants that were attorneys, and certain of plaintiff's former attorney's, appraisers, and potential umpires as **friends** that have negatively impacted decisions made by them against plaintiff; and have consistently displayed disdain, malice and a mental attitude or disposition toward plaintiff that is so drastic and serious so as to impair these judge's impartiality beyond recovery, that it is not possible that a fair trial can be held before them, and they must be disqualified (*Briggs v. Superior Court* (2001) 87 Cal. App. 4th 312, 318-319, 104 Cal. Rptr. 2d 445; Ng v. Superior Court (1997) 52 Cal. App. 4th 1010, 1024, 61 Cal. Rptr. 2d 49].

g. Judges RICHMAN and BRICK Failed to DISQUALIFY Themselves: The Bay court's reasoning resorts to the expressed maxim what is " sauce for the goose is sauce for the gander.'" (*Bay, supra*, 762 F.2d at p. 1315.)

When the herein named judges failed to disqualify themselves, even after a second service of the motion, after they acted with of misconduct; conduct prejudicial; negligence; bias; prejudice; bad faith; inappropriate ex parte communications; denial of due process; obstruction of justice; denied plaintiff the presumption of innocence; racism; preference, friendship and favoritism displayed towards certain parties; erroneous decisions; the accusations made by the judges of plaintiff's criminal conduct without any evidence; the retaliation, disdain, and malice exhibited toward plaintiff by said judges and as such; impress on those their fixed opinion and a judicial imprimatur of the defense's position; relating that " the plaintiff committed fraud"; was a "liar"; was "the problem"; and had financial motives not to complete the appraisal suggesting criminal activity, thus again expressing their fixed opinion and establishing their blatant hostility and willful misconduct is grounds for removal.[*re Kreling v. Superior Court* (1944) 25 Cal. 2d 305, 312-313, 153 P.2d 734, *Keating v. Superior Court* (1955) 45 Cal. 2d 440, 444, 289 P.2d 209; *Briggs v. Superior Court* (1932) 215 Cal. 336, 343, 10 P.2d 1103, *Evans v. Superior Court* (1930) 107 Cal. App. 372, 382-383, 290 P. 662] Further, with this very same hostility committed by the judges in this matter, in *Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778 [119 Cal.Rptr. 841, 532 P.2d 1209], the court removed a judge from office for acting with hostility toward an attorney, failing to properly disqualify himself, maliciously attempting to prejudice a criminal defendant's case, attempting to influence the disposition of criminal matters as a favor to friends and political supporters, and appointing friends and supporters as attorneys in cases in which the defendant was not entitled to counsel at public expense. Notwithstanding the petitioner's "pervasive course" of judicial misconduct (id. at p. 797), we declined to disbar, observing that "justice [would] best be served by allowing petitioner to resume the practice of law." (Id. at pp. 802-803.)

A judge was removed for the same in *Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615 [175 Cal.Rptr. 420, 630 P.2d 954]. There the court sustained 10 charges of willful misconduct in separate incidents, including abuse of the contempt power, failure to properly disqualify himself, and banishing an attorney from the courtroom because the petitioner suspected the attorney

had communicated with the Commission on Judicial Performance concerning his conduct. Again, we declined to disbar.

The sustaining of 18 charges of willful misconduct and charges of prejudicial conduct led to removal in *Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359 [188 Cal.Rptr. 880, 657 P.2d 372]. Among the incidents of willful misconduct, which were characterized as a "continuous course of overreaching and abuse of judicial authority" (id. at p. 371), were interceding on behalf of criminal defendants for the benefit of friends and benefactors, arbitrary bail-setting, impugning the character of colleagues, personal verbal attacks, and ethnic and racial slurs.

h. Untimely Service

The judges have argued that the motions filed by plaintiff was untimely as per C.C.P. §170.4(b) in that they complain about conduct that happend in the past. This argument is offerred as if discovery of facts happen simultaneously as desired by the judges and must be presented at the earliest practical opportunity as per C.C.P. §170.3(c(1)). The operative word here is "practical". The earliest "practical" opportunity would have been at present because there did not exist prior to now the practical time to make a necessary motion for disdqualification. These motions meets that criterion.

III.

CONCLUSION

For the foregoing reasons. Plaintiff prays that this court issue an order that:

1. Judges James A. Richman and Stephan A. Brick be disqualified from hearing this matter and all others involving plaintiff in the future.

Respectfully submitted this 12th day of July, 2005.

ABDUL-JALIL al-HAKIM
Plaintiff in Pro Per

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Plaintiff

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

ABDUL-JALIL al-HAKIM, Plaintiff, V. CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU, KENNETH C. GEORGE, RONALD J. COOK, WILLOUGHBY, STUART & BENING, AND DOES 1 THROUGH 100 , inclusively, Defendants, _____/	Case No. 811337-3 **DECLARATION OF PLAINTIFF IN SUPPORT OF MOTION TO DISQUALIFY JUDGES. C.C.P. §170.1, §170.1(a)(6)** **Date: July 22, 2005** **Time: 9:00 A.M.** **Location: Department 31** **Trial Date: NONE**

I, ABDUL-JALIL al- HAKIM, hereby declare as follows:

1. I am the plaintiff in the above-entitled action and this declaration is submitted in support of the Motion TO DISQUALIFY JUDGES James A. Richman and Stephan A. Brick. I have personal knowledge of the contents of this declaration and, if called as a witness, could and would testify competently to them.

2. That on Monday, June 27, 2005, I received signed orders dated June 22, and 24, 2005, striking the challenge of Judges James A. Richman and Stephan A. Brick for cause pursuant to C.C.P.107.3(c)(1) on the grounds of lack of proper service, that the respective judges were not personally served, but rather served by mail(attached as **Exhibit "B"**.)

3. That the referrenced order further states that the challenge was "buried" on pages 14 through 18 of the 19 page memorandum of points and authorities that addressed the STAY OF ACTION PENDING COMPLETION OF APPRAISAL AND APPRAISAL AWARD; FOR DETERMINATION OF THE CURRENT STATUS OF THE ORDER FOR STAY AND TIME TO BE EXCLUDED FROM CALCULATING THE FIVE-YEAR DISMISSAL STATUTE; and TO SPECIALLY-SET FOR TRIAL PRIOR TO EXPIRATION OF THE FIVE- YEAR STATUTE.

4. Although the disqualification consumed almost thirty(30%) percent of the memorandum while still addressing five (5) other major issues, it was termed "buried" by the respective judges.

5. That the signed orders dated June 22 and 24, 2005, striking the challenge of Judges James A. Richman and Stephan A. Brick for cause are identical, though signed individually by the respective

judges on different days.

6. The referenced order never addresses the issues that caused plaintiff to file the motion, that is his certainty that the judges can not be fair and impartial.

7. That the referenced order states that the judges used an "abundance of caution" in interpreting the challenge. If that is so then they would have recused themselves to remove any possible doubt about their impartiality even if it is only in the mind of the plaintiff. For that is where the test of the law remains and plaintiff will not waive this conflict.

8. If the judges are to err, than it should be on the side of caution with their recusal, and not their insistence on forcing their presence where it has and will cause further conflict and result in further appeal.

9. That it is this very same bias, prejudce, malicious attitude, disposition and defiance in the respective judges' conduct which has occurred in the past that plaintiff is illustrating, that he fears, is apparent to all by their insistence on not recusing themselves and he is filing this complaint about.

10. That on Saturday, July 9, 2005, I received signed orders dated July 6, 2005, striking the challenge of Judges James A. Richman and Stephan A. Brick for cause pursuant to C.C.P.107.3(c)(1) on the grounds that the motion was untimely filed because the events complained about occurred in the past, and lack of legal basis against the respective judges(attached as **Exhibit "J"**.)

11. That the signed orders dated July 6, 2005, striking the challenge of Judges James A. Richman and Stephan A. Brick for cause are virtually identical, though signed individually by the respective judges.

12. At the hearing on July 11, 2005, contesting the tentative ruling of Judge Richman to deny plaintiff's Motion to Determine the Stay due to lack of proper service, judge Richman stated that he had denied the motion to disqualify him, which was why he felt he could rule on the motion before the court. Mr. Barber never stated that he was in any way impaired or prejudiced by the service or filing when in fact he had timely responded and plaintiff's reply was filed with the court 10 days before the hearing. Judge Richman refused to address the issue and merely stated that the motion was asking for very technical things and the service needed to be technical as well in his denying the motion for improper service. Plaintiff requested that the parties waive service and proceed with the hearing and that also was denied. Plaintiff stated that he had reserved August 15, 2005, as the date for the hearing on the refiled motions for both the motions filed June 17 and 29, 2005 which included the motions to disqualify Judge Richman and Brick. Defense counsel Mr. Barber asked to clarify if those motions were inclusive of the motions to disqualify the judges and plaintiff responded "absolutely ", I will continue to persue it, as plaintiff established that he was objecting to the continued presence of the biased and prejudiced judges in this matter. Judge Richman replied that he "had made some mistakes" as had the plaintiff and Mr. Barber. Plaintiff affirmmed to judge Richman that he had reserved the August 15, 2005 date to hear the motions to disqualify and that on Saturday, July 9, 2005, he had received the latest order striking the challenge of Judges James A. Richman and Stephan A. Brick for cause as well as an Order to Show Cause from a hearing on a motion held on June 16, 2005 presided over by judge Richman, that plaintiff knew nothing of. It is perfectly clear to plaintiff that judges Richman and Brick will not, in good faith, recuse themselves, thus the current motion and the filing of a formal complaint with the State

Judicial Council.

13. That this case currently has an appeal pending in lareg part due to a previuos ruling made by Judge Richman that carries these same elements complained about by plaintiff.

14. That the latest proposed umpire Ralph Lombardi, someone whom Judge Richman has mentioned on many occasions is a friend, had refused and failed to provide his legally required full written disclosure since September 2003 until recently only to disclose after 18 months that he has a business relationship with all the defendants and serves as co-counsel and a bad faith consultant for the defense. Further, he reiterated that in his capacity as the umpire in this matter, wherein he could gather any information that he wanted, he would also consult the defense on this matter after the completion of the proposed appraisal in the bad faith litigation. Plaintiff refused to waive this conflict.

15. That I am aware, feel, believe and thereon allege that Judges Richman and Brick have been guilty of misconduct and shown disdain, malice, bias and/or prejudice towards plaintiff in the past, so therefore, for the purposes in this and future proceeding, that is grounds for disqualification and are disqualified from hearing the above entitled matter under Code Civ. Proc. § 170.l(a)(6) for I am convinced that a fair and impartial trial hasbeen denied in the past and could not be had before these judges now or in the future.

16. That in the past they both have exhibited this misconduct, disdain, malice, bias and/or prejudice; has stated a belief that prohibits the right to the presumption of innocence until proven guilty on behalf of plaintiff; has stated a belief that plaintiff has committed perjury; has shown a fixed opinion of plaintiff, the matter before the court and law; has exhibited and expressed remorse and regret for rulings that were made in plaintiff's favor and subsequently engaged in rulings to destroy them afterwards; has exhibited bias and preference for the defense counsels, defendants that were attorneys, and certain of plaintiff's former attorney's, appraisers, and potential umpires as **friends** that have negatively impacted decisions made by them against plaintiff; and have consistently displayed disdain, malice and a mental attitude or disposition toward plaintiff that is so drastic and serious so as to impair these judge's impartiality beyond recovery, that it is not possible that a fair trial can be held before them, and they must be disqualified. This declaration and the statements contained herein will serve as Plaintiff's Statement of Disqualification for the herein named judges and list their transgressions are as follows:

a. As to Judge James A. Richman;

He convened an *in camera* hearing in judges chambers on January 15, 2004 on the Motion by Burnham Brown to be Relieved as attorney of Record. Judge Richman stated that "I (Richman) gave you(plaintiff) the best decision(motion to vacate the appraisal awards) that I have written" in my years on the bench and immediately you dropped your attorney. I explained that the motion to vacate was written by Michael Michel and revised by Steve Brady, that Mr. McKeown was merely the attorney of record when it was heard before him. Judge Richman expressed extreme regret for having made that decision and now seems intent on dismantling it any way that he can.

He again mentioned that he was **friends** with Dave Rudy- the plaintiffs former appraiser, Ralph Lombardi- the proposed umpire, members of the defense firm of Ropers Majeski, and partners of

Burnham Brown though not Eric Haas and that "you don't trust anyone", and "if there is a problem then it must be you!!!(plaintiff)". Here, he does not conceal his fixed opinion, disdain, malice, bias, prejudice, and misconduct. Here he has clearly expressed that the plaintiff is "the problem" and he has maintained this fixed opinion that he has expressed continuously since that time.

When he was informed that plaintiff was aware of an undisclosed conflict regarding both Lombardi- who has a business relationship with the defendants, was co-counsel and a bad faith consultant for the defense; and defendants appraiser, Tim Schmal- whom was now tainted because he had studied the documents and transcripts from both the plaintiff's EUO and appraisal hearings that Judge Richman had vacated; and that the current course of the appraisal would wind up in a motion to vacate just as the first, he stated that " I do not know if that is a conflict and I don't know if I would make that same decision again". Clearly the defendants interjecting into this appraisal of the very the same issues that Judge Richman found objectionable in the first appraisal is grounds for and assures another verdict of fraud against the defendants and would vacate any award rendered by that panel. Again he does not conceal his bias, prejudice, and misconduct while he expresses his fixed opinion.

He stated that he knew the case very well and that he believed that " the inference is that you(plaintiff) committed fraud or inadvertent fraud" thus again expressing his fixed opinion and establishing his latent bias, prejudice and willful misconduct. There has been no trial of the facts and evidence yet he totally removed any possibility of the presumption of innocence on behalf of the plaintiff from his mind.

The court convened a hearing *in camera* on June 8, 2004 on the Motion by Charles Bonner to be Relieved as attorney of Record. Judge Richman again mentioned that he was impressed with plaintiffs' former attorney in the motion to vacate Mr. McKeown, he is **friends** with Dave Rudy- the plaintiffs former appraiser, Ralph Lombardi- the proposed umpire, members of the defense firm of Ropers Majeski, and partners of Burnham Brown and now Eric Haas, has had cases with Mr. Bonner before and was obviously distressed.

Plaintiff again expressed his experiences with the former counsels and agents, corrected him regarding Mr. McKeown(he meant Colin Munroe) and stated that his only concern was to have Mr. Bonner to answer the defendants motions for summary judgment and to dismiss and he would retain new counsel with only days before trial and that the court would cause irreparable harm to his case if it decide otherwise. He informed the court that Mr. Bonner had never informed him of any irreconcilable differences regarding the severely conflicted appraiser and in fact agreed that he could not serve on the panel; that he had not done any of the things that he had promised upon being retained; never followed up on any of the normal duties that any attorney would have during the normal course of litigation; he misstated his educational and legal background; the professional abilities of his firm; the association of a Law firm as co-counsel in Oregon(we later found out he did not know anyone at the firm and it was actually located in Washington State); the retention of a local co-counsel(whom Bonner was representing in a wrongful termination case wherein he had been fired because he lost a sure multimillion dollar verdict and did not want to make a disclosure) that later wanted to be paid to answer the defendants motions for summary judgment and to dismiss; and the possible retaining of two

potential appraisers(neither of which was ever retained, one was so severely conflicted and none of his references would recommend him while one did not know him, that he refused to make the court required full written disclosure and the other potential appraiser felt that he was not right for the job and never called back); and again requested that Bonner perform his duties as prescribed under the law while reiterating that the court would cause irreparable harm to his case if it decide otherwise.

Mr. Bonner gave testimony that the appraiser that he named and was the subject of the alleged irreconcilable difference had in fact refused to give a full written disclosure, that plaintiff had provided him with a list of retired judges from JAMS to serve as an appraiser, that he was going to bring on co-counsel as represented by plaintiff, that **he** never asked to be paid to answer the defendants motions and that he had the defendants second motions for summary judgment and to dismiss and had planned to withdraw as counsel weeks before he had informed plaintiff of either due to an irreconcilable difference over the severely conflicted appraiser.

After Mr. Bonner had given his testimony as to his reasons for withdrawal, Judge Richman asked Bonner if he stood behind his allegations, and upon affirmative answer, stated to plaintiff that "I suppose that you have a rebuttal for all this, but you should be concerned about what happens from here". Plaintiff expressed that he indeed did want to establish the truth of the matters presented by Mr. Bonner, but having been intimidated by Judge Richman and baited to pass on the opportunity to rebut, he agreed so as not to anger the court and stated again that his concern was to have Mr. Bonner to answer the motion and he would retain new counsel and that the court would cause irreparable harm to his case if it decide otherwise. Since plaintiff had not rebutted, Judge Richman again mentioned plaintiffs' former attorney's and mumbled about how he would not normally rule this way, then seized the opportunity and called plaintiff "a liar" and relieved Mr. Bonner of any further duties only days before trial and ordered the transcript of the hearing to be sealed, so as to conceal his disdain, malice, bias, prejudice, and willful misconduct. Here he has clearly expressed that the plaintiff is "a liar" and has committed perjury while he has maintained his fixed opinion that he had expressed in the earlier hearing on Burnham Brown while coercing plaintiff into not rebutting the testimony of Bonner and bringing his evidence to support his position.

The court convened a hearing on June 29, 2004 (transcript attached as **Exhibit "C"**)on the defendants Motion for Summary Judgment and to Dismiss and Judge Richman again begins to discuss plaintiff's prior attorney's and appraisers in announcing his desire to dismiss them from the suit. He had information that he felt allowed him to question plaintiff's request for the lawfully required full written disclosure on part of the appraisers and umpires while plaintiff's attorney confirms that the disclosures are satisfactory. Judge Richman then back tracks saying "I'm not talking about that". Richman then acknowledges that the motion to dismiss doesn't have appropriate notice- needs 45 days and only has 42 at most. Again he requests to dismiss the individuals from the summary judgment who are named "on theories that are pretty far out there" and "they are lawyer's, just like you(plaintiff's counsel Mr. Hubbard) and Mr. Barber are lawyers". He makes this statement despite the fact that in January 2003 he ruled that these same individuals had committed tortuous acts against plaintiff in denying their motion for summary judgment. Never the less, he again says he feels bad for the individuals

defendants(attorney's) in this suit, and in an emotional lapse, says "he is troubled by the case, that he opened up the appraisal and made the order for plaintiff". While in this obvious state of remorse and regret, he says "soon as I did(grant the motion), his lawyer leaves, I never understood that". He goes on further to say that there has been four lawyers since he has been on this case, and "something is going on that troubles him". In this noticeable feeling of despair, he again says he is **friends** with and knows plaintiff's former appraiser Rudy, and proposed umpire Lombardi, former counsels Haas and Bonner and he doesn't understand what's going on and repeats it's very troubling, and this is the largest civil file in 6 years in law and Motion, he doesn't understand it.

The court convened a hearing on August 26, 2004 (transcript attached as **Exhibit "D"**.) and Judge Richman tells the defense counsel to "take him(plaintiff) to trial and put before the jury that he spent 19 months futzing around firing Rudy and disagreeing with Lombardi(**his well noted friends**) and giving outrageous requests for disclosure". He rhetorically states "his damages is increasing because he is out of the home" further suggesting that "plaintiff has motives not to complete the appraisal" accusing plaintiff of wrongdoing. The decision that was rendered at this hearing to grant the defendant attorney's motion for summary judgment is now before the Court of Appeals, in part because of the disdain, malice, bias, prejudice, and willful misconduct displayed by Judge Richman during the hearings referenced above.

Thus, in listing the herein contained transgressions committed by Judge Richman against plaintiff, the Honorable Judge Richman is prevented from deciding the case according to the evidence and is unable to conduct a fair, unbiased, impartial or unprejudiced hearing on any of the issues of fact or law which will arise, because there is certainty, not doubt, regarding his capacity to be impartial and that the interest of justice require his recusal.

b. As to Judge Stephan A. Brick;

In a small claims matter, plaintiff sent a letter dated January 30, 2002 (attached as **Exhibit "E"**.) informed Judge Brick that he had retained counsel to aid in the collection of a debt after Judge Brick had stated in court on January 24, 2002 that he would grant attorney's fees for same when Judge Brick found defendant had committed fraud.

At the hearing on February 13, 2002 Mr. Raju admitted that he had forged his son Anthony Raju's signature on the THIRD PARTY claim of exemption filed with the Sheriff's Office on January 3, 2002 on Cal Fed account #023-013632-7. Mr. Robert Raju further admitted that Anthony never knew about the THIRD PARTY claim of exemption. Judge Brick ordered payment of attorney's fees in the amount of $2,000 and any subsequent amount of fees that would cover all time allocated on this matter until it's conclusion for the fraud and perjury committed by Raju in that matter.

At a hearing on April 2, 2002, Judge Brick reiterated that he had granted attorney fees to plaintiff and requested plaintiffs attorney to prepare a motion for same that he would grant.

At a hearing on May 20, 2002, Judge Brick denied the same motion for attorney's fees and costs when plaintiff appeared with new counsel that was unable to file the motion due to a computer problem in the clerks office.

Plaintiff sent a letter dated June 25, 2002, (attached as **Exhibit "F"**.) to Judge Brick stating

that the court had ordered the bond in my name to pay this debt, I expected that the amount would be remitted upon notice. The company's refusal to pay demanded that we return to court immediately for enforcement and collection of all associated fees for same. This was another clear violation of the court order to pay and the previous court findings of contempt against Mr. Raju in his continuing acts of fraud. Judge Brick never enforced his orders requiring the attorney's to deposit the funds with plaintiff. Also, Judge Brick had dismissed plaintiff's motion for attorney's fees and/or sanctions in the alternate because the motion was not timely served on defendants, Plaintiff had to petition the court on a motion for reconsideration in the matter of the attorney's fees and sanctions because I was in the clerks office filing the motion until 6:00 p.m. that evening of April 29, 2002 and by the time that I left the court house, Mr. Ammon had left his office and it was too late to serve him timely. There was a new administrative person handling the matter with her supervisor and two other clerks, but due to the lack of familiarity with small claims matters in this civil department and the computers being down, they were not even able to "bar code label" the motion and file it until the following day, April 30, 2002. It was impossible to serve Mr. Ammon in a timely fashion and the merits of those motions needed to go forward and be heard. That motion was later granted on September 17, 2002.

Plaintiff sent a letter dated Tuesday, October 8, 2002, (attached as **Exhibit "G"**.)to Judge Brick objecting to his Conditional Order that a defendant be allowed the benefit of being dismissed from the action because it had failed to timely serve and file any response to a motion despite having the motion in it's hands for over a month before the court date, but allowed them to deduct attorneys fees and costs from money that they had fraudulently obtained from Defendant Raju, and to avoid paying the same fees that it owes to plaintiff for having to file the motion to execute on the bond. Latter in December 2002, having forgotten that plaintiff had made this objection, Judge Brick requested that plaintiff file a formal complaint stating the same objection for the matter to be heard. Further, Judge Brick never enforced his orders requiring the attorney's to deposit the funds with plaintiff.

Plaintiff sent a letter dated November 27, 2002, (attached as **Exhibit "H"**.)to Judge Brick reminding him that plaintiff had not received the order on Attorney's Fees and Costs on The Motion to Execute on the Bond and The Renewed Motion that he had already stated(in September 2002) that he would provide for both matters, it was simply a matter of how much. Upon receiving that assurance from Judge Brick, we agreed to forego the requested fees and costs as sanctions, only to have him latter decided that he could not find any law to grant attorney's fees. Again, Judge Brick never enforced his orders requiring the attorney's to deposit the funds with plaintiff.

Plaintiff sent a letter dated December 11, 2002, (attached as **Exhibit "I"**.)to Judge Brick stating that due to his counsel having been out of state, he is unable to file any oppositions nor to respond to any filed by the defendants related to his "Order Denying Motion for Attorneys' Fees and To Enforce Bond, and Disposing Funds Deposited With The Court". Plaintiff had already done so in October 2002, and this action was based on the previous findings and instruction by the court on numerous occasions during several hearings that plaintiff could retain counsel and said fees and costs would be imposed and awarded as sanctions in the alternate of a Motion for Attorneys Fees against defendant Raju. The court has at it's discretion and on it's own motion should maintain the integrity of

the bench and go forward and award such fees as the best legal, moral, ethical, and just action to take. Again, Judge Brick ordered that defendant attorneys to be allowed the benefit of being dismissed from the action when they had failed to timely serve and file any response to a motion despite having the motion in it's hands for over a month before the court date, and further allowed them to deduct attorneys fees and costs from money that they had fraudulently obtained from Defendant Raju, yet he dismissed an action for same against plaintiff when he could not timely serve defendant because of a computer failure in the clerk's office and denied plaintiff the fees and costs that he had ordered and promised for nearly a year. Again, Judge Brick never enforced his orders requiring the attorney's to deposit the funds with plaintiff.

Here as with Judge Richman, in listing the herein contained transgressions committed by Judge Brick against plaintiff, the Honorable Judge Brick is prevented from deciding the case according to the evidence and is unable to conduct a fair, unbiased, impartial or unprejudiced hearing on any of the issues of fact or law which will arise, because there is certainty, not doubt, regarding his capacity to be impartial and that the interest of justice require his recusal.

17. That I am not an attorney and I am not currently represented by counsel. I am unfamiliar with judicial procedure, unable to conduct depositions, answer pleadings, file oppositions and the necessary motions to competently litigate this case so that it can be decided on it's merits and not my inability to serve as an attorney.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 12th day of July, 2005, at Oakland, California.

ABDUL-JALIL al-HAKIM
Plaintiff

EXHIBIT A

STEPHAN A. BARBER (SBN 70070)
ROPERS, MAJESKI, KOHN & BENTLEY
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Telephone: (408) 287-6262
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Attorneys for Defendants
CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU, KENNETH C. GEORGE, RONALD J. COOK, WILLOUGHBY, STUART & BENING

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

ABDUL-JALIL al-HAKIM,

Plaintiffs,

v.

CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU, KENNETH C. GEORGE, RONALD J. COOK, WILLOUGHBY, STUART & BENING, and DOES 1 through 100, inclusive,

Defendants.

CASE NO. 811337-3

NOTICE OF MOTION AND MOTION TO COMPEL CONTRACTUAL APPRAISAL AND FOR STAY OF ACTION PENDING COMPLETION OF APPRAISAL; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATIONS OF RONALD J. COOK AND STEPHAN A. BARBER IN SUPPORT THEREOF

Date: August 10, 1999
Time: 9:00 a.m.
Dept: 31

TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN that on August 10, 1999 at 9:00 a.m. in Department 31 of the above-entitled court located at 1225 Fallon Street, Oakland, California defendants CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU ("CSAA-IIB"), KENNETH C. GEORGE, RONALD J. COOK, and WILLOUGHBY, STUART & BENING will move the court for orders compelling contractual appraisal of plaintiff's insurance claims and staying this action pending completion of the appraisal process.

This motion is made and based upon the ground that both plaintiff and defendant

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Exhibit "A"

CSAA-IIB have demanded appraisal of plaintiff's insurance claims which are the subject of this lawsuit; that plaintiff has failed and refused to complete the appraisal process; and that the appraisal process must be completed before this lawsuit can further proceed.

This motion is made pursuant to Code of Civil Procedure §§1280(a), 1281.2, and 1281.4 and Insurance Code §2071 as well as the express terms of the homeowner's policy issued by plaintiff.

This motion will be based on this Notice of Motion, the Memorandum of Points and Authorities, the Declarations of Ronald J. Cook and Stephan A. Barber in support thereof and supporting papers, the pleadings, records and papers on file herein and upon such oral or documentary evidence or showing as may be made at the hearing of said motion.

Dated: July 7, 1999

ROPERS, MAJESKI, KOHN & BENTLEY

By _____
STEPHAN A. BARBER
Attorneys for Defendants
CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU, KENNETH C. GEORGE, RONALD J. COOK, WILLOUGHBY, STUART & BENING

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

ABDUL-JALIL al-HAKIM,

Plaintiffs,

v.

CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU, KENNETH C. GEORGE, RONALD J. COOK, WILLOUGHBY, STUART & BENING, and DOES 1 through 100, inclusive,

Defendants.

CASE NO. 811337-3

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL CONTRACTUAL APPRAISAL AND FOR STAY OF ACTION PENDING COMPLETION OF APPRAISAL

Date: August 10, 1999
Time: 9:00 a.m.
Dept: 31

I.

INTRODUCTION

Plaintiff ABDUL JALIL al-HAKIM is an insured of defendant CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU ("CSAA-IIB"). Plaintiff purchased a homeowner's policy ("Policy") from CSAA-IIB which insured his Oakland home. A true and correct copy of the Policy's applicable declarations pages and policy booklet are attached as Exhibit "A" to the accompanying declaration of Ronald J. Cook. The Policy was in full force and effect in 1997 and 1998.

The defendants in this case are CSAA-IIB, KENNETH C. GEORGE ("GEORGE"),

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RONALD J. COOK ("COOK"), and the law firm of WILLOUGHBY, STUART & BENING ("WILLOUGHBY"). GEORGE is an insurance adjuster employed by CSAA-IIB who had primary responsibility for plaintiff's insurance claims. COOK is a San Jose attorney employed by WILLOUGHBY. CSAA-IIB retained COOK and WILLOUGHBY on March 2, 1998 to provide legal counsel, guidance and assistance with respect to plaintiff's insurance claims. See COOK Declaration, ¶2.

Plaintiff's lawsuit involves two insurance claims. The first claim arose on February 19, 1997 and involved damage to plaintiff's home caused by a sewage spill in the basement. This claim was designated as Claim No. HO-01-563316-9 ("Claim 01"). The second claim arose on February 4, 1998 and involved a roof leak in plaintiff's home that caused damage thereto. This claim was designated as Claim No. HO-02-563316-9 ("Claim 02"). See COOK Declaration, ¶2.

The Policy contains the following provision:

> 6. **Appraisal.** If you and we fail to agree on the amount of a covered loss, either one can demand that the amount of the loss be set by appraisal. If either makes a written demand for appraisal, each shall select a competent, independent appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers shall then select a competent, impartial umpire. If the two appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge of a court of competent jurisdiction in the state where the residence premises is located to select an umpire. The appraisers shall then set the amount of the loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the amount of the loss. If the appraisers fail to agree within a reasonable time, they shall submit their differences to the umpire. Written agreement signed by any two of these three shall set the amount of the loss. Each appraiser shall be paid by the party selecting that appraiser. Other expenses of the appraisal and the compensation of the umpire shall be paid equally by you and us.

An appraisal provision is commonly found in property insurance policies and is a required provision of the statutory fire policy found in Insurance Code §2071.

CSAA-IIB has issued drafts to plaintiff on the two claims totaling $159,267.05. Plaintiff returned one of the drafts in the amount of $11,500, meaning that he has actually collected $147,767.05 to date. See COOK Declaration, ¶¶7 and 8.

Plaintiff has not been satisfied with the manner in which the two claims were handled by CSAA-IIB. He has failed or refused to commence repairs to his property, to submit completed

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personal property inventory forms, or to provide formal statements in proof of loss. See COOK Declaration, ¶¶8 and 9. An impasse has been reached in that CSAA-IIB believes that it has paid all sums presently due and owing to plaintiff under the Policy whereas plaintiff believes that further unstated benefits are still owed.

As a result of this impasse, CSAA-IIB demanded appraisal on October 26, 1998 of Claim 01. This demand was made by a letter from COOK to plaintiff that was delivered by facsimile and certified mail. See COOK Declaration, ¶¶11 and 12. Plaintiff has now taken the position that CSAA-IIB waived its rights to appraisal because it allegedly failed to timely identify its appraiser. Plaintiff's position is incorrect, as more fully discussed below.

On November 27, 1998, plaintiff demanded appraisal of Claim 02. See COOK Declaration, ¶18.

Plaintiff originally designated David W. Johnson as his appraiser on both claims. Mr. Johnson withdrew as plaintiff's appraiser on March 16, 1999. Despite CSAA-IIB's requests, plaintiff has failed or refused to designate a new appraiser or to identify his umpire for appraisal. See COOK Declaration, ¶¶18, 35, and 41.

Plaintiff has chosen to institute this lawsuit even though the appraisal process has not been completed and even though the full extent of his policy benefits have not been established. CSAA-IIB respectfully submits that the appraisal process must be completed as to both Claim 01 and Claim 02 and that this lawsuit should be stayed pending completion of appraisal. Since plaintiff has refused to participate in the appraisal process, CSAA-IIB must move to compel appraisal.

The defendants have filed a demurrer to be heard on the same day as this motion. It is respectfully requested that the court make its ruling on the demurrer before ruling on this motion because certain defendants are seeking to be dismissed and would like a decision before any stay order is issued.

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II.

LEGAL ARGUMENT

A. The Law Relating To Arbitration Agreements Applies To Insurance Contract Appraisal Provisions

Ultimately, plaintiff's entire action arises out of a dispute over the valuation of his two insurance claims. The Policy specifically requires that such a dispute be submitted to the binding alternative dispute process of appraisal. In accordance with the Policy, both parties have timely requested appraisal. However, plaintiff has unjustifiably refused to proceed and therefore this motion is necessary.

An insurance policy's "Appraisal" provision is in effect a provision for arbitration and therefore enforceable under the law applicable to arbitration agreements. See Appalacian Ins. Co. v. Rivcom Corp. (1982) 130 Cal.App.3d 818, 824-25.

Sections 1280-1294.2 of the Code of Civil Procedure deal with Arbitration and the enforcement of Arbitration Agreements. CCP §1280(a) defines "Agreement" to include "agreements providing for valuations, appraisals and similar proceedings . . ." (Emphasis added.)

CCP §1281.2 specifically empowers the court to enforce the subject appraisal provision between plaintiff and CSAA-IIB:

> On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists . . .

CCP §1281.4 states that:

> If a court of competent jurisdiction, whether in this state or not, has ordered arbitration of a controversy which is an issue involved in an action or proceeding pending before a court of this state, the court in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or proceeding until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies.

B. CSAA-IIB Has Not Waived Its Right To Appraisal

Plaintiff has taken the position in correspondence to CSAA-IIB that CSAA-IIB has waived its right to appraisal. Specifically, plaintiff contends that he did not receive CSAA-IIB's

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designation of its appraiser, A. Michael DeCesare, by December 2, 1998, the date tacitly agreed to by the parties for their designations. This contention is unsupported by the facts.

COOK, on behalf of CSAA-IIB, designated its appraiser by letter dated November 30, 1998. This letter was faxed and mailed to plaintiff. See COOK Declaration, ¶19. The fact that Mr. al-HAKIM may not have picked up the fax copy from his fax machine or opened the letter by December 2, 1998 is of no legal consequence. The only important thing is that CSAA-IIB notified plaintiff of the designation of its appraiser within the agreed time, which is what the "Appraisal" section of the Policy requires.. See COOK Declaration, ¶¶20-23.

The California Supreme Court has made the law of waiver quite clear in the context of arbitration proceedings and insurance matters. In Christensen v. Dewor Development (1993) 33 Cal.3d 778, 782, the court held:

> Courts will closely scrutinize any claims of waiver and indulge every intendment to give effect to arbitration proceedings. Moreover, the burden of proof is heavy and rests on the parties seeking to establish waiver which is not to be lightly inferred . . . [M]ere delay in seeking a stay of the proceedings without some resultant prejudice to a party cannot carry the day.

In Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal.4th 951, 983-984, the California Supreme Court dealt with the issue of a purported delay in choosing arbitrators. The court held that the question of waiver is one of fact for the trial court. It held:

> [T]he delay must be substantial, unreasonable, and inspite of the claimant's own reasonable diligence. When delay in choosing arbitrators is the result of reasonable and good faith disagreements between the parties, the remedy for such delay is a petition to the court to choose arbitrators under [Code of Civil Procedure §1281.6, rather than evasion of the contractual agreement to arbitrate. The burden is on the one opposing the arbitration agreement to prove to the trial court that the other party's dilatory conduct rises to such a level of misfeasance and to constitute a waiver (citation omitted), and such waiver "is not to be lightly inferred" (citation omitted).

In Waller v. Truck Ins. Exchange, Inc. (1995) 11 Cal.4th 1, the California Supreme Court dealt with the issue of an insurer's alleged waiver in the context of failing to mention every ground for denying a defense to an insured in a third party case. The Waller court stated:

> Case law is clear that "[w]aiver is the intentional relinquishment of a known right after knowledge of the facts." The burden . . . is on the party claiming a waiver of a right to prove it by clear and convincing

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evidence that does not leave the matter to speculation, and "doubtful cases will be decided against a waiver."

The Waller court rejected the "automatic waiver rule" that has been followed in a few jurisdictions. In order for a valid waiver to occur, the insurer must either intend to waive its rights or act in a manner inconsistent with its legal rights. Further, for an estoppel to occur, the insured must prove that he detrimentally relied upon the insurer's action or inaction.

Obviously, the rule enunciated in Waller would apply across the board to all insurance issues. It would make no sense to follow one waiver rule in the context of duty to defend cases while following another in a first party property case.

It is also obvious that the California courts greatly favor arbitration, appraisal, or other alternative dispute resolution methods. A party alleging that his opponent has waived the right to an alternative dispute resolution procedure bears a heavy burden of showing that the opponent either subjectively intended the waiver or has acted inconsistently with the assertion of a legal right.

In the instant case, it is laughable for plaintiff to argue that CSAA-IIB supposedly "waived" its right to appraisal because it did not timely designate its appraiser. The declaration of Mr. COOK makes it clear that CSAA-IIB diligently pursued its contractual right to appraisal once an impasse occurred. CSAA-IIB agreed to a mutual extension of the time to designate appraisers on December 2, 1998, once the plaintiff informed it that he had not seen Mr. COOK's October 26, 1998 notice until November 12, 1998. CSAA-IIB gave plaintiff every benefit of the doubt in this regard and gave him more time to designate his appraiser so there could be no argument later on that CSAA-IIB was attempting to put plaintiff in a position where he may have waived his right to designate an appraiser. It is also clear from Mr. COOK's declaration that CSAA-IIB did designate its appraiser as to Claim 01 on November 30, 1998 and delivered that designation to plaintiff by certified mail and facsimile, with the latter method being the plaintiff's means of communicating with CSAA-IIB regarding his insurance claims.

More importantly, CSAA-IIB has always acted consistently with its original election of appraisal. Mr. COOK goes to great lengths to set forth the facts in his declaration and attach his letters which clearly show that CSAA-IIB attempted for months to get the plaintiff to go forward

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with the appraisal process as to both claims.

Finally, it is clear that plaintiff has not changed his position in reliance on any arguable act or omission of CSAA-IIB. The plaintiff in fact designated Mr. Johnson as his appraiser on Claim 01 and Claim 02 on December 3, 1998. It is also obvious from his letter to CSAA-IIB (Exhibit "M" to the COOK Declaration) that he wanted to appraise only certain aspects of Claim 01. Thus, the plaintiff himself has acted in such a manner, at least initially, as to indicate his acquiescence to the appraisal process.

A reading of the correspondence attached to the COOK Declaration makes it abundantly clear as to what is really happening. The plaintiff knows that he has been paid a large sum of money on his claims and that he has not complied with the Policy in terms of documenting his loss. His designated appraiser, Mr. Johnson, became disenchanted with the plaintiff and quit. Perhaps the plaintiff is having difficulty finding another appraiser and/or he does not want to pay for this process. Undoubtedly, plaintiff wants to avoid the appraisal process in the hope that a jury of lay people will decide the value of his contract claims rather than a panel of experienced and knowledgeable appraisers.

C. **This Motion Should Be Granted Without Prejudice To The Contractual Right Of CSAA-IIB To Obtain An Examination Under Oath/Deposition From Plaintiff**

On the assumption this motion will be granted by the court, CSAA-IIB wants to be thoroughly prepared to present its case appraisal or, if circumstances so warrant, reach a resolution of the insurance claim(s) before a formal decision by the appraisers. A relatively common way of obtaining information from an insured, regardless of whether there is litigation between the insured and insurer, is the examination under oath. ("EUO"). An EUO is akin to a deposition as it involves the insured giving sworn testimony regarding his insurance claim that is preserved in a transcript. The EUO procedure is provided for both by Insurance Code §2071 ("Requirements in case loss occurs: The insured shall . . . submit to examinations under oath by any person named by this company . . . .) and section 2.d.(3) on page 17 of the Policy (Your Duties After Loss. In case of a loss to which this insurance may apply, [the insured] shall see that the following duties are performed: . . . d. as often as we reasonably require: . . . [3] submit to examination under oath and

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subscribe the same;). Under California law, the insured is required to submit to an examination under oath, if required to do so by a proper notice, and this is a condition precedent to any right of action against the insurer. See Bergeron v. Employers' Fire Ins. Co. (1931) 115 Cal.App. 672.

In keeping with this statutory and contractual right, CSAA-IIB has noticed plaintiff's examination under oath/deposition for August 12, 1999. The purpose of this proceeding is to question plaintiff under oath regarding the nature of the policy benefits he is claiming for Claim 01 and Claim 02 and his entitlement to such benefits under the Policy. There is no intention by CSAA-IIB to cover other issues, such as plaintiff's tort claims, at this particular proceeding. This examination under oath/deposition was noticed without prejudice to the making of this motion to stay the litigation pending the completion of the appraisal process and is, in fact, a necessary part of the appraisal process. See Declaration of Stephan A. Barber and Exhibits "AA" and "BB" thereto.

D. **The Court Should Stay The Lawsuit For Approximately 90 Days, With The Exception Of Allowing The Plaintiff To Be Examined As To Issues Relating To The Information And Evidence Supporting Claim 01 And Claim 02**

As indicated above, CCP §1281.4 requires the court to stay this legal proceeding pending completion of the appraisal process. CSAA-IIB respectfully submits that if this motion is granted, the appraisal process should and can be completed as to both claims within 90 days of the hearing of this motion.

In sum, CSAA-IIB's motion should be granted because CSAA-IIB has timely demanded appraisal, timely designated its appraiser, and at all times acted consistently with its appraisal election. CSAA-IIB requests that the court make the following orders:

(1) That Claim 01 and Claim 02 are submitted to appraisal as to all items of loss for which CSAA-IIB has acknowledged coverage under the Policy;

(2) That plaintiff be required to designate his appraiser as to Claim 01 and Claim 02 not later than August 31, 1999;

(3) That A. Michael DeCesare, CSAA-IIB's designated appraiser, and plaintiff's appraiser shall confer and mutually select an umpire by September 15, 1999;

(4) That the umpire and designated appraisers shall conduct their work and take evidence in an expeditious manner and complete the appraisal process for Claim 01 and Claim 02.

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and file their award with the parties not later than October 31, 1999, unless such deadline is extended (by no more than 30 days) in writing by mutual agreement of the parties by the umpire, or by court order;

(5) That plaintiff and CSAA-IIB shall each pay for the services of their own designated appraiser and for one-half of the umpire's services;

(6) That the above-entitled action is stayed, with the exception of plaintiff's examination under oath/deposition on issues relating to the appraisal of Claim 01 and Claim 02, until ten (10) days after the appraisal award is filed with the parties or further order of the court; and

(7) Plaintiff and CSAA-IIB shall follow the Policy's terms and conditions pertaining to the presentation of plaintiff's claims and the appraisal process.

If the court issues all or most of the above orders, the parties' contractual right to appraisal will be preserved, the contract issues will largely be resolved, and the plaintiff will still be able to maintain his lawsuit against CSAA-IIB.

III.

CONCLUSION

Both the plaintiff and CSAA-IIB have the statutory and contractual right to demand appraisal. CSAA-IIB timely and properly demanded appraisal as to Claim 01. Plaintiff timely demanded appraisal for Claim 02. CSAA-IIB has at all times acted consistently with its demand for appraisal and has been attempting for months to gain plaintiff's cooperation to complete that process with respect to both claims. As set forth in the Declaration of Ronald J. Cook, plaintiff's contention that CSAA-IIB has "waived" its right to appraisal is without merit and the logical conclusion from plaintiff's actions is that he is playing games with CSAA-IIB for purposes of enhancing his litigation position.

Under the circumstances, CSAA-IIB has no choice but to request appropriate orders from this court compelling appraisal of Claim 01 and Claim 02. In addition, in order for the appraisal process to be expeditiously and economically completed, hopefully within 90 days, the court should order a stay of the litigation without prejudice to CSAA-IIB conducting an examination under oath/deposition of plaintiff for purposes of preparing for the appraisal process.

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WHEREFORE, it is respectfully prayed that this motion be granted.

Dated: July 7, 1999

ROPERS, MAJESKI, KOHN & BENTLEY

By _____
STEPHAN A. BARBER
Attorneys for Defendants
CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU, KENNETH C. GEORGE, RONALD J. COOK, WILLOUGHBY, STUART & BENING

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

ABDUL-JALIL al-HAKIM,

Plaintiffs,

v.

CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU, KENNETH C. GEORGE, RONALD J. COOK, WILLOUGHBY, STUART & BENING, and DOES 1 through 100, inclusive,

Defendants.

CASE NO. 811337-3

DECLARATION OF RONALD J. COOK IN SUPPORT OF DEFENDANT CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU'S MOTION TO COMPEL CONTRACTUAL APPRAISAL AND FOR STAY OF ACTION PENDING COMPLETION OF APPRAISAL

Date: August 10, 1999
Time: 9:00 a.m.
Dept: 31

I, RONALD J. COOK, declare:

1. I am an attorney duly licensed to practice law in all the courts of California. I am a member of the law firm of Willoughby, Stuart & Bening. I specialize in insurance coverage matters. I am competent to testify to the matters set forth in this declaration.

2. On March 2, 1998, my law firm was retained by the CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU ("CSAA-IIB") to provide legal counsel, guidance, and assistance with respect to two separate first party homeowner's claims presented to CSAA-IIB by ABDUL JALIL al-HAKIM, the plaintiff in the above-entitled matter. Willoughby Stuart & Bening designated me as the attorney from its office as having primary

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responsibilities for the handling of this assignment. The first claim arose on February 18, 1997 and involved damage to Mr. al-HAKIM's Oakland home caused by a sewage spill in the basement. This claim was designated as Claim No. HO-01-563316-9 ("Claim 01"). The second claim arose on February 4, 1998 and involved a roof leak in Mr. al-HAKIM'S home that caused damage thereto. This claim was designated as Claim No. HO-02-563316-9 ("Claim 02").

3. One of my functions was to communicate directly with Mr. al-HAKIM on behalf of the CSAA-IIB regarding these two claims. Mr. al-HAKIM had a fax machine at his home and he used facsimiles as the exclusive method of sending letters or "fax memos" to CSAA-IIB or me. After I was retained, I sent written communications such as correspondence to Mr. al-HAKIM by fax, mail, or sometimes certified mail. In virtually every instance, I sent the same letter to him by facsimile and regular mail. I know for a fact that Mr. al-HAKIM was receiving my facsimiles as he often responded to them. Mr. al-HAKIM never objected to my using facsimiles or regular mail to send him written communications.

4. Claims 01 and 02 were made under Mr. al-HAKIM's homeowner's policy No. HO-563316-9, which was sold to Mr. al-HAKIM by CSAA-IIB. A true and correct copy of said policy's declarations pages and policy booklet are attached hereto as Exhibit "A" ("Policy"). In general, both Claim 01 and Claim 02 were treated as covered claims under the Policy with the exception of a few individual components of those claims.

5. The CSAA-IIB's Homeowner's Claims Department did not receive notice of Claim 01 until late October, 1997. KENNETH C. GEORGE was the CSAA-IIB claims adjuster assigned to Claim 01, and then to Claim 02 after it was reported to CSAA-IIB. Most of my communications regarding Mr. al-HAKIM'S claims have been with Mr. GEORGE on behalf of the CSAA-IIB.

6. In November, 1997, CSAA-IIB paid Mr. al-HAKIM benefits to live at another location because he was required to move out of his home for a short time as a result of the damage. In the last two months of 1997 and the first few months of 1998, CSAA-IIB retained various contractors and experts to assess the nature and extent of the damage related to Claim 01. It took longer than usual to assess the extent and scope of the loss because there was contamination of the

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home and evaluation and repairs had to be conducted by individuals or companies with certain expertise.

7. Mr. al-HAKIM completed submittal of his own contractor's bid for repairs to CSAA-IIB as of March 2, 1998. These bids were evaluated, as were the estimates provided by the contractors brought in by CSAA-IIB. On April 22, 1999, CSAA-IIB issued a draft in the amount of $92,032.71 for the dwelling repairs connected with Claim 01. An additional dwelling payment was made to Mr. al-HAKIM on May 27, 1998 in the amount of $5,222.11. These drafts were made payable to Mr. al-HAKIM and his mortgagee as required by the Policy, and have been banked. The amount of these payments was greater than the amount of the repair estimate submitted by Mr. al-HAKIM'S contractor. With respect to the personal property aspect of Claim 01, CSAA-IIB has issued drafts payable to Mr. al-HAKIM totaling $17,058.20. CSAA-IIB has paid Mr. al-HAKIM $5,300 in loss of use benefits on Claim 01. With respect to Claim 02, CSAA-IIB has issued drafts to Mr. al-HAKIM totaling $28,154.03.

8. Mr. al-HAKIM was not satisfied with the manner in which the two claims were handled by CSAA-IIB. He continuously asked for more information and documentation from the contractors, even after the large dwelling payment was made in April, 1998. He returned an $11,500 draft payable to him that was issued on Claim 01. He failed or refused to commence repairs to his property, even though he had more than sufficient funds to repair the dwelling damage connected both claims. It is my understanding that to this day he has not commenced repairs to his dwelling other than to replace the worn out roof that caused most or all of the damage connected with Claim 02.

9. Mr. al-HAKIM has failed or refused to submit completed inventory forms for his personal property items, even though CSAA-IIB and I have repeatedly requested that he provide them and offered assistance to prepare them. He has refused to provide formal statements in proof of loss, even though they have been repeatedly requested by CSAA-IIB. Pursuant to the express terms on page 17 of the Policy, an insured is required to provide this information upon request of CSAA-IIB.

10. Notwithstanding the large payments of benefits made to Mr. al-HAKIM on Claim

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01 and Claim 02, Mr. al-HAKIM continued to dispute the estimates obtained by CSAA-IIB and CSAA-IIB's payment amounts. In October, 1998, it was obvious that an impasse existed between Mr. al-HAKIM and CSAA-IIB as to the amount of benefits allegedly due under the Policy on claim 01.

11. CSAA-IIB decided in October, 1998 to demand appraisal of Claim 01. The right to appraisal is specifically provided for in the Policy on page 19. An appraisal provision is commonly provided in property insurance policies such as CSAA-IIB's homeowner's policy form.

12. On October 26, 1998, I sent a letter to Mr. al-HAKIM informing him that CSAA-IIB was exercising its right to appraisal of Claim 01 and giving him formal notice of appraisal. I caused this letter to be sent to Mr. al-HAKIM by facsimile on October 26, 1998 and by certified mail. A true and correct copy of my October 26, 1998 letter including facsimile confirmation receipt dated October 26, 1999, is attached hereto as Exhibit "B". Attached hereto as Exhibit "C" is a true and correct copy of the receipt for certified mail, showing that Mr. al-HAKIM did not accept delivery of the certified envelope until November 12, 1998.

13. On November 3, 1998, Mr. al-HAKIM faxed a memo to Mr. GEORGE of CSAA-IIB inquiring about payment of certain items. I was provided with a copy of this fax memo. On November 6, 1998, I faxed/mailed a response letter to Mr. al-HAKIM. Among other things, my letter pointed out that Mr. al-HAKIM's November 3, 1998 fax memo did not acknowledge receipt of CSAA-IIB's appraisal demand and again informed him that he was required to identify his appraiser by November 20, 1998. A true and correct copy of my November 6, 1998 letter and facsimile confirmation receipt is attached hereto as Exhibit "D".

14. On November 11, 1998, Mr. al-HAKIM sent a fax memo to Mr. GEORGE of CSAA-IIB. A true and correct copy of said fax memo is attached hereto as Exhibit "E". In the first paragraph of this fax memo, Mr. al-HAKIM acknowledges receipt of the facsimiled copies of my October 26, 1998 and November 6, 1998 letters. Mr. al-HAKIM states that he did not go downstairs to retrieve these facsimiles from his fax machine until November 11, 1998. This was odd given the fact he sent a fax from that same machine on November 3, 1998. That means he must have retrieved my October 26, 1998 fax letter before November 11, 1998. Mr. al-HAKIM also

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acknowledged having the receipt for the certified copy of my October 26, 1998 letter, but offered no explanation as to why he did not pick up the letter from the post office sooner.

15. I was provided with a copy of Mr. al-HAKIM's November 11, 1998 fax memo. On November 13, 1998, I faxed him a letter. The original of the letter bore the date of November 5, 1998, which is a typographical error. The letter was in fact written and faxed to Mr. al-HAKIM on November 13, 1998. A true and correct copy of my November 13, 1998 letter and facsimile confirmation receipt is attached hereto as Exhibit "F". Among other things, this letter stated that I was unaware that Mr. al-HAKIM was not checking his fax machine or picking up his mail and that it was therefore acceptable for CSAA-IIB and Mr. al-HAKIM to mutually designate their appraisers on or before December 2, 1998. To give Mr. al-HAKIM all benefit of the doubt, and as a courtesy, the purpose of this extension was to start the 20 day time table on November 12, 1998, the day Mr. al-HAKIM picked up the certified copy of my October 26, 1998 letter.

16. On November 20, 1998, Mr. al-HAKIM sent a fax memo to Mr. GEORGE of CSAA-IIB. A true and correct copy is attached hereto as Exhibit "G". In this letter, Mr. al-HAKIM acknowledges receipt of the certified letter from me. It is also clear that Mr. al-HAKIM understood that CSAA-IIB had demanded an appraisal and had extended the deadline to December 2, 1998 to designate appraisers.

17. On November 24, 1998, I sent a facsimile to Mr. al-HAKIM to respond to his fax memo dated November 20, 1998. A true and correct copy of my November 24, 1998 letter is attached hereto as Exhibit "H". Among other things, my letter pointed out to Mr. al-HAKIM that CSAA-IIB's demand for appraisal created a mandatory, not elective, process. I reminded him that he must select his appraiser on or before December 2, 1998.

18. As noted above, my November 13, 1998 letter (Exhibit "F") stated that the mutual date for actually naming the parties' appraisers would be extended to December 2, 1998. Mr. al-HAKIM did not object to this extension or the different due date in his November 20, 1998 fax memo (Exhibit "G") nor had he otherwise voiced any objection to the extension. If he had objected to the extension, then I would have named CSAA-IIB's appraiser within 20 days of October 26, 1998, the date of the original appraisal demand. However, on November 27, 1998,

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which would be after the original 20 day period but before the expiration of the extended period to name appraisers, Mr. al-HAKIM sent a fax memo to Mr. GEORGE. A true and correct copy thereof is attached hereto as Exhibit "I". In this fax memo, Mr. al-HAKIM took the position that CSAA-IIB may have forfeited its right to appraisal by not identifying it's appraiser within 20 days of Mr. al-HAKIM's receipt of the written demand. This fax memo does not identify the date Mr. al-HAKIM deemed the written demand to have been received. He also purports to designate David W. Johnson to act as "co-appraiser with myself'. In my opinion, Mr. al-HAKIM is taking an inconsistent position because he is claiming waiver by CSAA-IIB on the one hand while purporting to designate his own appraiser on the other hand. I also interpreted this fax memo as a demand by Mr. al-HAKIM that Claim 02 be submitted to appraisal because the caption of his letter referred to both claims.

19. On November 30, 1998, I faxed and mailed a letter to Mr. al-HAKIM. A true and correct copy of said letter and facsimile confirmation receipt is attached hereto as Exhibit "J". This letter informed Mr. al-HAKIM that CSAA-IIB did not waive its right to appraisal, reminded him of the mutual extension of the date to name appraisers, informed him that Mr. al-HAKIM himself could not be an appraiser or "co-appraiser", designated A. Michael DeCesare as CSAA-IIB's appraiser, and informed him that the appraisal process only applied to the covered parts of an insurance claim.

20. On December 3, 1998, Mr. al-HAKIM sent a fax memo to Mr. GEORGE. A true and correct copy of said fax memo is attached hereto as Exhibit "K". This letter stated that CSAA-IIB had violated the appraisal condition because it had not identified its appraiser by December 2, 1998. Apparently, Mr. al-HAKIM ignored my November 30, 1998 facsimile, which was sent to the same fax number appearing on his fax memo, wherein I had designated Mr. DeCesare as CSAA-IIB's appraiser.

21. On December 4, 1998, I faxed a letter to Mr. al-HAKIM. A true and correct copy of this letter is attached hereto as Exhibit "L". My letter pointed out that CSAA-IIB had designated Mr. DeCesare as its appraiser for Claim 01 on November 30, 1998. I also pointed out that Mr. al-HAKIM could not have operated his own fax machine on December 3, 1998 (Exhibit

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"K") without retrieving my November 30, 1998 letter. This letter went on to state that CSAA-IIB designated Mr. DeCesare as its appraiser on Claim 02.

22. It was and is my opinion that as of December 4, 1998, appraisal had been timely demanded for both Claim 01 and Claim 02 and that the parties had timely designated Mr. DeCesare and Mr. Johnson as their respective appraisers as to both claims.

23. On December 9, 1998, Mr. al-HAKIM sent a fax memo to Mr. GEORGE of CSAA-IIB which purported to respond to my letters dated November 30, 1998 and December 4, 1998. A true and correct copy of said faxed memo is attached hereto as Exhibit "M". As with his other fax memos, Mr. al-HAKIM sent this to Mr. GEORGE, rather than to me, even though I had repeatedly asked Mr. al-HAKIM to send his letters to me rather than to MR. GEORGE and had reminded him of this request at the end of my November 24, 1998 letter (Exhibit "H"). This fax memo took the position that my November 30, 1998 letter had not been received in the mail until December 3, 1998 and totally ignored that I had faxed that letter to Mr. al-HAKIM on November 30, 1998. This fax memo went on to state that Mr. al-HAKIM would proceed on the appraisal condition of the homeowner's policy as it related to Claim 02 and the inventory of his personal property. It should be noted that the personal property claim was part of Claim 01, which means that Mr. al-HAKIM was and is attempting to unilaterally select which parts of Claim 01 he wants submitted to appraisal. This fax memo also stated that Mr. al-HAKIM's appraiser, David Johnson, would get in touch with CSAA-IIB's appraiser, Michael DeCesare, "where necessary".

24. On December 14, 1998, I faxed a letter to Mr. al-HAKIM, which was intended to reply to his December 9, 1998 faxed memo (Exhibit "M"). A true and correct copy of said letter is attached hereto as Exhibit "N". My letter pointed out that CSAA-IIB had not waived its rights to appraisal. Further, I pointed out that virtually all of the communications received from Mr. al-HAKIM had been by facsimile and that this was the primary method by which CSAA-IIB communicated with him. Additionally, I pointed out a Florida appellate case, Diaz v. American Bankers Ins. Co., which held that receipt of an appraiser designation one day after the time limit designated in the policy was substantial compliance with the policy provision. Finally, my letter stated that I wanted the appraisers to meet to discuss protocol to resolve the two claims as quickly

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as possible.

25. On December 15, 1998, David Johnson, Mr. al-HAKIM'S designated appraiser, sent a letter to Mr. GEORGE of CSAA-IIB. A true and correct copy of said letter is attached hereto as Exhibit "O". Mr. Johnson's letter states that he has been selected by Mr. al-HAKIM to act as his appraiser and the caption of his letter refers to both Claim 01 and Claim 02. This letter further states that he wishes to contact Mr. DeCesare so that they can select an umpire. Mr. Johnson's letter is copied to Mr. al-HAKIM.

26. It is important to note that Mr. al-HAKIM never informed me that Mr. Johnson's December 15, 1998 letter had been sent in error or that Mr. Johnson was only his appraiser on Claim 02. On behalf of CSAA-IIB, I thought it reasonable to interpret Mr. al-HAKIM's silence as an abandonment of his contention that CSAA-IIB had not complied with the deadline for designating its appraiser. Alternatively, I interpreted Mr. Johnson's letter, who is Mr. al-HAKIM'S agent, and Mr. al-HAKIM's acquiescence thereto as a waiver by Mr. al-HAKIM of any objections he had to any purported irregularity in the process of designating appraisers.

27. On December 29, 1998, I sent a letter to Mr. al-HAKIM by certified mail—return receipt requested. A true and correct copy of said letter is attached hereto as Exhibit "P". The purpose of this letter was to demand that Mr. al-HAKIM submit sworn statements in proof of loss on both claims within 60 days, as required by paragraph 2.e. on page 17 of the Policy. The letter also notified him that his failure to complete these documents and return them within the required 60 days could constitute a material breach of this condition of his homeowner's policy.

28. Exhibit "P" was sent to Mr. al-HAKIM's home address, as designated on the Policy. I received it back in my office in March 1999 from the post office, unopened and unclaimed.

29. In December and January, 1999, I corresponded with Mr. DeCesare, CSAA-IIB's designated appraiser, and sent him materials for his use in the appraisal process. These efforts caused expense to CSAA-IIB for both Mr. DeCesare's and my services.

30. On January 7, 1999, I faxed and mailed a letter to Mr. al-HAKIM. A true and correct copy of said letter is attached hereto as Exhibit "Q". Among other things, my letter pointed out that while David Johnson, Mr. al-HAKIM's appraiser, had contacted Mr. DeCesare, he had not

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yet received his retainer fee or a signed appraisal agreement from Mr. al-HAKIM and was therefore not willing to move forward with the appraisal until the contract and retainer fee issues were resolved. I asked Mr. al-HAKIM to attend to these matters as soon as possible so the appraisal process could proceed quickly.

31. Mr. DeCesare continued to try to meet with Mr. Johnson so the appraisal process could move forward. By the end of January, 1999, Mr. al-HAKIM had still not paid Mr. Johnson's retainer fee or signed a contract. CSAA-IIB was concerned that Mr. Johnson was no longer Mr. al-HAKIM's appraiser. On February 2, 1999, I mailed and attempted to fax a letter to Mr. al-HAKIM asking him to confirm his appraiser and selection of an umpire within a reasonable time. A true and correct copy of my February 2, 1999 letter is attached hereto as Exhibit "R".

32. On March 5, 1999, Mr. DeCesare wrote me a letter updating his efforts to move the appraisal process forward with Mr. Johnson. A true and correct copy of Mr. DeCesare's March 5, 1999 letter is attached hereto as Exhibit "S". According to the letter, Mr. Johnson was not receiving cooperation from Mr. al-HAKIM and had done no work on the appraisal process.

33. Mr. al-HAKIM continued to be uncooperative in the appraisal process, even for the appraisal of Claim 02. Therefore, on March 12, 1999, I faxed Mr. al-HAKIM a letter which was intended to outline the recent events and respond to certain matters pertaining to his claims, including appraisal. At the end of the letter, I requested once again that he identify his umpire for appraisal within 15 days or otherwise CSAA-IIB would have no choice but to file a motion to compel appraisal with the local court. A true and correct copy of my March 12, 1999 letter is attached hereto as Exhibit "T".

34. On March 12, 1999, I also mailed Mr. al-HAKIM another letter requesting that he submit sworn statements in proof of loss for each claim. This letter included blank statements for him to fill out and return. This letter was necessary because Mr. al-HAKIM had failed/refused to claim my December 29, 1998 letter. This time, I simply mailed and faxed the letter. A true and correct copy of this March 12, 1999 letter is attached hereto as Exhibit "U".

35. On March 17, 1999, Mr. DeCesare sent me a fax memo, which included a March 16, 1999 letter from Mr. Johnson to Mr. al-HAKIM withdrawing as his designated appraiser. A true

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and correct copy of Mr. Johnson's March 16, 1999 letter is attached hereto as Exhibit "V".

36. On March 22, 1999, I faxed a letter to Mr. al-HAKIM regarding Mr. Johnson's withdrawal as his appraiser. The letter requested that Mr. al-HAKIM designate a new appraiser. A true and correct copy of this letter is attached hereto as Exhibit "W".

37. On March 25, 1999, Mr. al-HAKIM sent a fax memo to Lynn Koehler of CSAA-IIB, who is now the adjuster on the file after Mr. GEORGE's retirement. A true and correct copy of the March 25, 1999 fax memo is attached hereto as Exhibit "X". This fax memo acknowledges receipt of my letter requesting the submission of sworn statements in proof of loss. The fax memo erroneously claims that I made statements about Mr. Johnson which "expunged" his integrity and tarnished his reputation. The fax memo attempts to blame me for Mr. Johnson's withdrawal as the appraiser, despite the fact I never spoke to Mr. Johnson, and only restated what he had said to Mr. DeCesare. Mr. al-HAKIM makes no mention of wanting to cooperate in moving the appraisal process along for either Claim 01 or Claim 02.

38. On April 19, 1999, Mr. al-HAKIM filed the instant lawsuit naming CSAA-IIB, KENNETH C. GEORGE, my law firm, and me as defendants. I was not aware of the existence of this lawsuit until it was served on June 8, 1999. At that time, I had the authority to file a motion to compel appraisal and was intending to file it in June, 1998.

39. Mr. al-HAKIM made no effort, to my knowledge, to move the appraisal process along after I wrote my March 22, 1999 letter (Exhibit "W"). Therefore, on May 11, 1999, I faxed Mr. al-HAKIM another letter. A true and correct copy of my May 11, 1999 letter to Mr. al-HAKIM is attached hereto as Exhibit "Y". Among other things, this letter reminded Mr. al-HAKIM of CSAA-IIB's request for sworn statements in proof of loss, pointed out that CSAA-IIB had not waived its right to appraisal, denied stating anything about Mr. Johnson or having any direct contact with him, and stating CSAA-IIB's position regarding certain individual claim items.

40. By the end of May, 1999, Mr. al-HAKIM had failed to submit the requested sworn statements in proof of loss, failed to submit completed personal property inventory forms, failed to commence repairs on his home even though he had been paid in excess of $100,000 for those repairs more than a year before, failed to designate a new appraiser, and failed to submit

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promised documents. Therefore, I wrote him a letter on June 2, 1999 confirming these failures and stating that it was CSAA-IIB's position that it had already paid any and all aspects of his claims that could be verified and which were not in dispute. My letter also stated that until Mr. al-HAKIM fulfilled his contractual obligations under the Policy, it was doubtful whether any further progress could be made on his claims. A true and correct copy of my June 2, 1999 letter is attached hereto as Exhibit "Z".

41. As of the signing of this declaration, Mr. al-HAKIM has not designated an appraiser or submitted the sworn statements in proof of loss. Prior to being served with Mr. al-HAKIM's lawsuit in early June, 1999, CSAA-IIB had been reluctant to file a motion to compel appraisal because it was hopeful that Mr. al-HAKIM would cooperate without resort to court assistance and the related expense to both parties. It is now obvious that Mr. al-HAKIM seeks to avail himself of court assistance, even though he has failed to comply with his contractual obligations. Therefore, CSAA-IIB has no choice but to file the instant motion to compel appraisal so that the appraisers and umpire can determine whether CSAA-IIB owes additional policy benefits to Mr. al-HAKIM and, if so, the exact dollar amount thereof.

42. As an attorney experienced in the handling of first party insurance claims, I know from past experience that the appraisal process will resolve any contractual issues regarding the covered portions of Claim 01 and Claim 02. This means the trier-of-fact in the lawsuit will not be called upon to determine the dollar amounts which may be owed for covered claims as those issues will necessarily be decided through the alternative dispute resolution process of appraisal.

I declare under penalty of perjury that the foregoing is true and correct to the best of my personal knowledge and that this declaration was executed on July 1, 1999 at San Jose, California.

RONALD J. COOK

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

ABDUL-JALIL al-HAKIM,

Plaintiffs,

v.

CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU, KENNETH C. GEORGE, RONALD J. COOK, WILLOUGHBY, STUART & BENING, and DOES 1 through 100, inclusive,

Defendants.

CASE NO. 811337-3

DECLARATION OF STEPHAN A. BARBER IN SUPPORT OF DEFENDANT CALIFORNIA STATE AUTOMOBILE ASSOCIAITON INTER-INSURANCE BUREAU'S MOTION TO COMPEL CONTRACTUAL APPRAISAL AND FOR STAY OF ACTION PENDING COMPLETION OF APPRAISAL

Date: August 10, 1999
Time: 9:00 a.m.
Dept: 31

I, STEPHAN A. BARBER, declare:

1. I am an attorney at law licensed to practice before the courts of the State of California, and a member of the law firm of Ropers, Majeski, Kohn & Bentley, counsel of record for defendants CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU ("CSAA-IIB"), KENNETH C. GEORGE ("GEORGE"), RONALD J. COOK ("COOK"), and WILLOUGHBY, STUART & BENING ("WILLOUGHBY") herein, on whose behalf I make this declaration. If called as a witness, I would competently testify to the following facts, all of which are within my own personal knowledge.

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2. As set forth and explained in the accompanying Declaration of Ronald J. Cook, CSAA-IIB has demanded contractual appraisal of Claim 01 and plaintiff has demanded contractual appraisal of Claim 02. CSAA-IIB's motion to compel appraisal has become necessary because plaintiff has failed or refused to cooperate in completing the process.

3. CSAA-IIB believes that it has already paid or tendered to plaintiff the policy benefits which are owed and documented on the two insurance claims. Plaintiff apparently claims additional benefits, but he, in the opinion of CSAA-IIB, has not properly documented these items. Therefore, CSAA-IIB has determined to exercise its statutory and contractual right to conduct an examination under oath of plaintiff.

4. Since plaintiff has chosen to sue CSAA-IIB even though Claim 01 and Claim 02 have not been finally adjusted, CSAA-IIB has searched for a way to obtain the examination under oath in an economical and efficient manner while avoiding unnecessary duplication. The method arrived upon is to conduct an examination under oath/deposition of plaintiff, noticed in the above-entitled lawsuit, so that the information concerning plaintiff's insurance claims can be obtained in one proceeding. The transcript of this sworn proceeding can then be used in the appraisal process, if necessary, and/or in the lawsuit, assuming that the lawsuit continues after completion of the anticipated appraisal process.

5. Attached hereto as Exhibit "AA" is a true and correct copy of the Notice of Examination Under Oath/Deposition which I caused to be served on plaintiff, through his attorney, Michael Michel. The proceeding is scheduled for August 12, 1999 and there is an accompanying request for documents.

6. Attached hereto as Exhibit "BB" is a true and correct copy of my July 7, 1999 letter to Michael Michel, plaintiff's attorney. This letter explains that the purpose of the above proceeding is to conduct an examination under oath of the plaintiff that would also constitute the first part of his deposition in the litigation. The scope of the August 12, 1999 proceeding would be limited to the policy benefits plaintiff is claiming and his alleged entitlement to those benefits under the insurance policy. Plaintiff would later give a full-blown deposition, which would include questioning about his tort causes of action, if the litigation proceeds further.

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7. The above examination under oath/deposition of plaintiff has been noticed without prejudice to CSAA-IIB's position that the litigation should be stayed pending completion of the appraisal process. Plaintiff would have to be questioned about these issues regardless of whether the motion is granted or denied. If the motion is granted, the information is necessary so that CSAA-IIB can prepare for the appraisal process and, if appropriate, attempt to reach a final resolution of Claim 01 and/or Claim 02 without requiring the appraisers and umpire to make a decision. On the other hand, if the motion is denied, CSAA-IIB would still need the information for purposes of defending plaintiff's lawsuit. Thus, the examination under oath/deposition is not inconsistent with CSAA-IIB's motion to stay the litigation.

I declare under penalty of perjury that the foregoing is true and correct to the best of my personal knowledge. Executed on July 7, 1999, at San Jose, California.

Stephan A. Barber

STEPHAN A. BARBER, ESQ.

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EXHIBIT B

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

ABDUL-JALIL al-HAKIM, Plaintiff, v. CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU, KENNETH C. GEORGE, RONALD J. COOK, WILLOUGHBY, STUART & BENING, AND DOES 1 THROUGH 100, inclusively, Defendants.	No. 811337-3 ORDER STRIKING CHALLENGE FOR CAUSE PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 170.3(c)(1)

On June 17, 2005, Plaintiff Abdul-Jalil al Hakim ("Plaintiff") filed with the Clerk of the Court a document entitled "Notice of Motion and Motion in Support of Stay of Action Pending Completion of Appraisal and Appraisal Award; for Determination of the Current Status of the Order for Stay and Time to Be Excluded From Calculating the Five Year Dismissal Statute; To Specially–Set for Trial Prior to Expiration of the Five Year Statute; and to Disqualify Judges. C.C.P. §§583.310, et seq., C.C.P. §36(e), C.C.P §170.1, §170.1(a)(6)." The document is in excess of 80 pages and consists of a notice and memorandum of points and

authorities with exhibits. It is filed in support of a motion to be heard in the law and motion department. Buried on pages 14 through 18 of the memorandum, Plaintiff asserts that Judge James A. Richman should be disqualified. In an abundance of caution, the Court interprets this portion of the memorandum as a Challenge for Cause pursuant to C.C.P. §170.1(a)(6) (the "Challenge").

Having read and considered the Challenge, the Court HEREBY STRIKES it for lack of proper service pursuant to CCP §170.3(c)(1). Under that section, a challenge for cause "shall be served on each party or his or her attorney who has appeared *and shall be personally served on the judge alleged to be disqualified, or on his or her clerk, provided that the judge is present in the courthouse or in chambers.*" (Emphasis added.) Here, the proof of service on the Challenge indicates that it was only served by mail on Judge James A. Richman, and there is no indication of personal service on either Judge Richman or his clerk. Accordingly, the Challenge is procedurally deficient and must be stricken.

IT IS SO ORDERED.

JUN 2 2 2005

Date

James A. Richman
Judge of the Superior Court

Case No./Title: C-811337 al-Hakim vs. California State Automobile Association

CLERK'S CERTIFICATE OF MAILING

I certify that the following is true and correct: I am the clerk of the Alameda County Superior Court and not a party to this cause. I served this ORDER STRIKING CHALLENGE FOR CAUSE PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 170.3(c)(1) by placing copies in envelopes addressed as shown below and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

✓ Abdul-Jalil al-Hakim
7633 Sunkist Drive
Oakland, CA 94605

Stephan A. Barber
ROPERS, MAJESKI, KOHN & BENTLEY
80 North First Street
San Jose, CA 95113

Ronald J. Cook
WILLOUGHBY, STUART & BENING
Fairmont Plaza
50 West San Fernando, Suite 400
San Jose, CA 95113

Dated: June 22, 2005

Executive Officer/Clerk of the Superior Court

By _____
Elizabeth Opelski-Erickson, Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

ABDUL-JALIL al-HAKIM, Plaintiff, v. CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU, KENNETH C. GEORGE, RONALD J. COOK, WILLOUGHBY, STUART & BENING, AND DOES 1 THROUGH 100, inclusively, Defendants.	No. 811337-3 ORDER STRIKING CHALLENGE FOR CAUSE PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 170.3(c)(1)

On June 17, 2005, Plaintiff Abdul-Jalil al Hakim ("Plaintiff") filed with the Clerk of the Court a document entitled "Notice of Motion and Motion in Support of Stay of Action Pending Completion of Appraisal and Appraisal Award; for Determination of the Current Status of the Order for Stay and Time to Be Excluded From Calculating the Five Year Dismissal Statute; To Specially–Set for Trial Prior to Expiration of the Five Year Statute; and to Disqualify Judges. C.C.P. §§583.310, et seq., C.C.P. §36(e), C.C.P §170.1, §170.1(a)(6)." The document is in excess of 80 pages and consists of a notice and memorandum of points and

authorities with exhibits. It is filed in support of a motion to be heard in the law and motion department. Buried on pages 14 through 18 of the memorandum, Plaintiff asserts that Judge Steven A. Brick should be disqualified. In an abundance of caution, the Court interprets this portion of the memorandum as a Challenge for Cause pursuant to C.C.P. §170.1(a)(6) (the "Challenge").

Having read and considered the Challenge, the Court HEREBY STRIKES it for lack of proper service pursuant to C.C.P. §170.3(c)(1). Under that section, a challenge for cause "shall be served on each party or his or her attorney who has appeared *and shall be personally served on the judge alleged to be disqualified, or on his or her clerk, provided that the judge is present in the courthouse or in chambers.*" (Emphasis added.) Here, the proof of service on the Challenge indicates that it was only served by mail on Judge Steven A. Brick, and there is no indication of personal service on either Judge Brick or his clerk. Accordingly, the Challenge is procedurally deficient and must be stricken.

IT IS SO ORDERED.

Jan 24, 2005
Date

Steven A. Brick
Judge of the Superior Court

CLERK'S DECLARATION OF MAILING

I certify that I am not a party to this cause and that on the date stated below I caused a true copy of the foregoing ORDER STRIKING CHALLENGE FOR CAUSE to be mailed first class, postage pre paid, in a sealed envelope to the persons hereto, addressed as follows:

Abdul-Jalil al-Hakim
7633 Sunkist Drive
Oakland, CA 94605

Stephan A. Barber
ROPERS, MAJESKI, KOHN & BENTLEY
80 North First Street
San Jose, CA 95113

Ronald J. Cook
WILLOUGHBY, STUART & BENING
Fairmont Plaza
50 West San Fernando, Suite 400
San Jose, CA 95113

I declare under penalty of perjury that the same is true and correct.
Executed on June 24, 2005.

By: _____
Yolanda Estrada, Deputy Clerk
Department 31

EXHIBIT C

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

BEFORE THE HONORABLE JAMES A. RICHMAN, JUDGE

DEPARTMENT 31

---oOo---

COPY

ABDUL-JALIL AL-HAKIM,

Plaintiff,

vs.

Case No. C-811337

CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU,

Defendants.
_____/

REPORTER'S TRANSCRIPT OF PROCEEDINGS
U.S. POST OFFICE BUILDING
June 29, 2004

A P P E A R A N C E S:

For the Plaintiff: JULIAN HUBBARD
Attorney at Law

For the Defendants: STEPHAN A. BARBER
Attorney at Law

Reported by:
ANNIE MENDIOLA
CSR #9837

June 29, 2004 Morning Session

---oOo---

P R O C E E D I N G S

THE COURT: Case No. 811337-3, al-Hakim versus CSAA.

MR. BARBER: Good morning, Your Honor.

Stephan Barber for moving parties.

MR. HUBBARD: Good morning, Your Honor.

Julian Hubbard on behalf of the plaintiff.

THE COURT: Well, 60 day continuance, you want, Mr. Hubbard?

MR. HUBBARD: That's correct.

THE COURT: What do we do with the trial date?

MR. HUBBARD: We would also ask for a continuance of the trial date.

THE COURT: What are you going to do in the interim, do you think?

MR. HUBBARD: We're going to select an appraiser, confirm the umpire. We're going to move forward and complete the appraisal process and determine after the appraisal process whether there are any issues to try.

THE COURT: What are you going to do about the motion to dismiss?

MR. HUBBARD: We'll meet that within the 60 day time period that we're setting.

THE COURT: When you say you're going to meet it, what is there about this case that should allow whatever goes on between Mr. al-Hakim and all of his prior lawyers and/or himself and/or his appraisal that should keep pending a

lawsuit against the individual? Let's forget for a minute CSAA. People have been in this lawsuit since 1999. Why should they stay in?

MR. HUBBARD: Well, Your Honor, there's been previous motions for summary judgment on some of the individual issues. Those have been denied is my understanding. What we would simply ask for since we are the new guys on the block is an opportunity to get in to understand all of the facts in this case and take the appropriate action, whether it be dismissal of the individual defendants, whether it be confirming the appraisal process and get this thing on the right track. It needs that, Your Honor. I agree.

And I also agree that the defendants' motion has some basis in fact and we need to sort out, we need to be given the opportunity since my client was just relieved of his counsel as of June 8th, we need to be able to sort out what's real about the case and what's not and move it forward.

THE COURT: Well, I take it, and I've got to be very careful, I suppose, what I say here because I'm the one that's been involved in many of the changes of counsel and what of much goes on here is off the record. But on the record when Mr. Bonner was standing right where you were standing a month or so ago, he presented me with various, I guess, I'll call them exhibits. I didn't take them as exhibits. And I don't remember, I don't think Mr. Barber was here, where Mr. al-Hakim presents to appraisers, and for that matter, I guess lawyers, these disclosure statements that are off the

charts and what they expect. I take it you've seen those.

MR. HUBBARD: I have, Your Honor.

THE COURT: You have an appraiser in mind?

MR. HUBBARD: I have two in mind, Your Honor. And both, even though I haven't had a chance to talk to Mr. Barber about them, I understand his company at least had experience with both and finds both to be very credible.

I understand that the disclosure you're referring to, at least one form that I saw, I haven't seen what Bonner presented, and I would agree that the process itself requires disclosures and those are satisfactory to us, the very disclosures inherent in the process.

THE COURT: I'm not talking about that. I'm not talking about a form that Mr. al-Hakim has apparently prepared that, I guess, people say I'm not willing to go this far, but okay.

Well, I understand, I guess, your position.

Mr. Barber, what about continuing it for 60 days?

First let me say I understand that this isn't raised and perhaps it's been waived already, but I don't think the motion to dismiss has appropriate notice. Needs 45 days, doesn't it?

MR. BARBER: We gave 45 days. Hand-delivered notice is my understanding.

THE COURT: Served before it was filed. Filed with the Court on the 17th of May.

MR. BARBER: 17th. It was served, according to the proof of service, by personal service on May 17th.

THE COURT: That's not 45 days. Don't count the 17th. Even assuming you did, that's 14 days in May and 29 days in June.

MR. BARBER: You're right. And I don't know why we didn't serve it sooner. The Court can also dismiss it on its own motion.

THE COURT: You need 20 days notice to dismiss on my own motion.

Well, what about, at this point, what's wrong with giving Mr. Hubbard his request? Give him 60 days to come up with whatever he's going to come with and have it determined, shall we say, I don't know about on the merits because on the merits isn't really a motion to dismiss. It's discretionary.

MR. BARBER: Well, Your Honor, I don't personally doubt Mr. Hubbard's sincerity or expectations. We've heard this many times before from other lawyers. Mr. al-Hakim has had seven lawyers and six appraisers and they all bow out. The umpire has not been paid. He asked to be paid months and months ago. Mr. Bonner stood here before you, told he was going to do the same thing that Mr. Hubbard expects to do, yet he withdrew, try to upset the appraisal process by contesting the umpire that Mr. al-Hakim had suggested in the first place, took the position that we had to appoint a new appraiser. He did or at the direction of his client he did everything he could to derail the process.

This case was ordered to appraisal on September 2nd, 1999, and you ordered a re-appraisal in February of 2003. And today, we have no appraiser for Mr. al-Hakim and the umpire

has not been paid and worried that he will withdraw from the process.

I don't doubt Mr. Hubbard's personal sincerity, but I don't think he or anybody else can deliver what's been stated here. If you look at the track record for Mr. al-Hakim and his past representation, no one can deliver the goods in this case, in my opinion.

THE COURT: I understand your argument.

MR. HUBBARD: Your Honor, the only surety or additional support I can provide is that I would request that in the interest of both parties that any order issued have some real teeth in it as of today, that the 60 day time period is one in which there's an ironclad time for the hearing on a motion for summary judgment. It is one in which the appraisal process is anticipated and expected to be completed so that we get off this process of the continuing round of appraisers and/or attorneys.

THE COURT: Where does that get you with the motion to dismiss? It doesn't get the case any further along and the motion to dismiss is based on a failure to prosecute. As I say, I've said this many times in many different context, not to say that there's a difference in the standing before the Court of corporations versus individuals, but CSAA is in part in the business of litigating. I guess you could say they're in the business of insurance. These people, these individuals are in this case on theories. I don't know what you're talking about about other motion for summary judgment. I don't have any recollection of that. Maybe they were brought

before me, maybe they weren't.

MR. HUBBARD: I may be wrong.

THE COURT: These people are in on theories that are pretty far out there and their lawyers, just like you and Mr. Barber is a lawyer, at least some of them are, have been dragged now in a case that is over five years old and I don't get it. And now I've got a discretionary motion to dismiss and it's not based on the appraisal has to happen. It's based on the case hasn't been brought to trial. It's over three years. In this case, five years. I understand time couldn't have been because it was stayed by Judge Needham. That's what concerns me.

I'm going to give you the opportunity in part because their motion isn't filed. I take it, you're going to waive that. I'll push it out far enough. There's another 45 days, if need be.

We'll set it out -- if you need 60 days at this point. I feel bad for the individuals, but what's another 60 days, I guess, is one way to look at it. Set it for July -- August the 26th, 9:00. That will be both motions. Oppositions will just have to come in based on the statutory time, whenever that is. And I'll vacate the trial date. I guess, you don't want a new trial date. Do you want a new trial date?

MR. HUBBARD: Yes, Your Honor.

THE COURT: I'll give you a trial date.

MR. HUBBARD: If you're able to set out that far.

THE COURT: Set it for trial, let's say in the

middle of October. Is that good? October 15th.

MR. BARBER: I don't have my trial calendar with me. I know I have some trial set in October and November.

THE COURT: Get together with Mr. Hubbard and just let us know before I issue the order. Call Liz directly as to a date that's been agreed on sometime from October 15 on. And go from there.

But, Mr. Hubbard, I accept your representation at face value.

MR. HUBBARD: Thank you, Your Honor.

THE COURT: Per the challenge from Mr. Barber, you're not going to be able to deliver, that's not the issue as I see it. Whether you're going to deliver or not deliver, you're going to have to come up with some opposition as to why this case, one, shouldn't be dismissed for failure to prosecute, and two, assuming you do that, you got to overcome the summary adjudication, summary judgment. I understand part of the summary judgment motion is based on the examination under oath case that they haven't complied with a condition precedent, in essence, the appraisal. I don't know that the law is that says that. I have not gotten to the merits of that. There's no case that I'm aware that says that point blank. But I did first party insurance defense. We did Royal Globe and Hoffman in the district court. I know about examinations under oath and how that works. I know what that is. There's other substantive issues that these individuals have brought about no fraud and no misrepresentations and no reliance and no damage. So you can, whatever you're going to

put forward, you're going to put forward. And then I'll deal with it in August. But it's very troubling, this case. And I'm the one, I'm the one that opened up this appraisal. I made an order that I've never made before in favor of Mr. al-Hakim. And I no sooner did it that his lawyer leaves. And I never understood that and there's been four lawyers since. Something is going on there and I don't know what it is, but it's very troubling to me.

The trial date is vacated. The two motions on calendar for today are continued and I'll do the order. You let us know as to the trial date.

MR. HUBBARD: We shall.

MR. BARBER: I'd like to take Mr. Hubbard up on his suggestion on an order with some teeth in it and I would suggest that orders be made that Mr. al-Hakim has to deposit the $5,000 with the umpire by a certain date and appoint an appraiser by a certain date. We've been waiting for something like a year to get the appraisal paid -- the umpire paid and worried he's going to back out.

THE COURT: If you guys can agree on whatever you want to agree on, fine by me. I don't see any reason to do that. The ball is in Mr. al-Hakim's court. We know what he has to do. I know Dave Rudy. I know Lombardi. I know Eric Haas. I know Bonner. Some by reputation, some I don't. I don't understand any of what's gone on here. That's all I can tell you.

I'm not making any conditional orders or anything like that, if that's what you mean. I am just continuing it.

And I guess it ought to be clear enough to Mr. Hubbard and Mr. al-Hakim this whole scenario is very troubling. Just because I'm continuing it doesn't mean I don't think that the motion may have merit. I don't know what you're going to come up with. The case is over five years old and it hasn't had anything happen. Nothing, that I can tell. And the case is in volume 22 of the court's file. It may be the largest civil case that we've had here in my six years in law and motion. I don't understand it.

Call Liz with a trial date and I'll do the rest of the order. If you got any other things you want to put in the order, be my guest.

MR. HUBBARD: Thank you very much, Your Honor.

(Proceedings were concluded.)

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STATE OF CALIFORNIA)
)
COUNTY OF ALAMEDA)

I, ANNIE T. MENDIOLA, CSR No. 9837, do hereby certify that I am an Official Court Reporter of the Superior Court of the State of California, and that as such I reported the proceedings had in the above-entitled matter at the time and place set forth herein;

That my stenographic notes were thereafter transcribed into typewriting under my direction; and that the forgoing pages constitutes a full, true and correct transcription of my said notes.

ANNIE MENDIOLA, CSR #9837

Dated: October 24, 2004